93-10

Supreme Court, U.S.
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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1992, Term

MARK T. CULLEN
PETITIONER

vs.

TRAINOR, ROBERTSON, SMITS & WADE, ET. AL.,
RESPONDENTS

PETITION FOR REVIEW

To The Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

MARK T. CULLEN
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PETITIONER, IN PRO SE

QUESTIONS PRESENTED FOR REVIEW

A. Whether California's statute of limitation for legal malpractice (Civil Code of Procedure §340.6) is unconstitutional as it violates due process since the statute is vague as to the meaning of "actual injury".

B. Whether a partnership is a separate legal entity, and if so, should the appellate court differentiate a partnership cause of action from an individual cause of action as it relates to the statute of limitations for legal malpractice under Civil Code of Procedure §340.6.

C. Whether petitioner has been denied due process and equal protection of the law since the lower courts have barred petitioner from bringing a cause of action for fraud against respondents.

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OPINIONS BELOW

The Supreme Court of California denied Petition for Review March 31, 1993. A copy is attached as Appendix A of Appendix.

The Court of Appeal, Third Appellate District, Opinion on Denial of Petition For Rehearing was filed on February 1, 1993. A copy is attached as Appendix B of Appendix.

The Court of Appeal, Third Appellate District, first Opinion was filed January 4, 1993. A copy is attached as Appendix C of Appendix.

The second opinion of the Superior Court filed on September 27, 1991. A copy is attached as Appendix D of Appendix.

The first opinion of the Superior Court filed on July 16, 1991. A copy is attached as Appendix E of Appendix.

JURISDICTION

This petition for writ of certiorari is taken from a decision rendered on March 31,

1993, by the Supreme Court of California, a court of last resort, in the case styled MARK T. CULLEN v. TRAINOR, ROBERTSON, SMITS, & WADE, et. al., Case No. S031216. This Court has jurisdiction pursuant to the provisions of 28 U.S.C.S. §1257(3) (Law. Co-op. 1988).

CONSTITUTIONAL PROVISIONS INVOLVED

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV, §1.

"No person shall be . . . deprived of . . . property, without due process of law;" U.S. Const. Amend. V.

STATEMENT OF THE CASE

The underlying action for legal malpractice

and fraud arose out of legal representation provided to Mark T. Cullen (hereinafter "petitioner"), and Cullen Development Company, a general partnership, by the law firm of Trainor, Robertson, Smits and Wade and individual attorneys: Charles Trainor, Stuart Smits, William Davis, Dave Robertson, and Gary Funamura (hereinafter collectively referred to as "respondents").

Due to the complexity of the underlying case wherein the legal malpractice and fraud were committed, petitioner, will first set forth a summary of the Housing Authority v. Cullen, et al. case.

A. The underlying Housing Authority v. Cullen Claim.[1]

Cullen Development Company was a California General Partnership comprised of petitioner,

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[1] Petitioner has petitioned the Court for a WRIT OF CERTIORARI to review the underlying connected Housing Authority v. Cullen case, No. 92-1765. Pursuant to Rule 201 of the Federal Rules of Evidence, petitioner respectfully requests the Court take Judicial Notice of the above referenced case.

Richard Cullen, and James Cullen. The partnership was formed for the sole purpose of doing construction work. Petitioner was the managing and qualifying partner with the California State Contractors License Board. Additionally, petitioner was responsible for providing all of the financial backing for the partnership, whereas, Richard Cullen and James Cullen provided onsite field work.

In 1984, Cullen Development Company entered into four Public Works Construction Contracts with the Housing Authority, County of Sacramento. Late that year, problems and disputes developed between the Housing Authority and Cullen Development Company. On or about April 22, 1985, Cullen Development Company filed a Cessation of Work Notice on all four contracts and stopped any, and all, further work with the Housing Authority.[2]

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[2] A detailed discussion of the dispute between the Housing Authority and petitioner may be found in Administrative Law Judge Smith's decision. (Appendix J) Pursuant to Rule 201 of the Federal Rules of Evidence, petitioner respectfully requests that the Court take Judicial Notice of the above-

Thereafter, the Housing Authority sued Cullen Development Company, a general partnership, and petitioner individually, for breach of Contract on the Rio Linda Project and filed four complaints with the California State Contractors License Board. On or about September of 1985, Cullen Development Company, as a partnership, and petitioner, as an individual, employed respondents to represent petitioner and Cullen Development Company throughout the litigation, including the filing of four Cross-Complaints as to the four contracts.

On October 25, 1985, respondents filed a Demurrer to the Housing Authority First Amended Complaint, which was overruled by the court, and an Answer was ordered to be filed. Thereafter, on December 9, 1985, respondents filed an Answer to the First Amended Complaint. For reasons unknown to petitioner, respondents took no further actions for almost 14 months.

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referenced decision.

On February 5, 1987, respondents entered into a stipulation (without petitioner's knowledge or approval) with Housing Authority attorney Bleier for the filing of a single cause of action Cross-Complaint on only one contract, the Rio Linda Contract, just thirteen days before the February 18, 1987 scheduled trial date.

On February 6, 1987, **twelve (12) days** before the scheduled trial date, respondents made a Motion to Amend the Trial Setting Order and to allow for further Law and Motion. This was a direct result of respondents's **complete failure to prepare for trial**. As an example of how reprehensible and inadequate respondents's legal representation was, see Declaration of respondents (dated February 6, 1987).[3] The

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[3] **Declaration of Cullen Attorney Davis [Trainor]**, in pertinent part:

"8. Defendants [Cullens] timely propounded a request for Production of Documents on Plaintiff's [Housing Authority] Counsel. To date defendant's counsel has not reviewed said records. At no point in time did plaintiff's counsel represent that said documents could not be removed after the discovery cut-off date. In order to adequately prepare this matter for trial, it is necessary that these documents be

trial court denied said request by respondents.

The bottom line is, that respondents were faced with going to trial on February 18, 1987, **without any pre-trial preparation or discovery**.

On February 24, 1987, respondents sent petitioner a letter stating that the trial date had been rescheduled to June 16, 1987.

On June 3, 1987, **just thirteen days** before the second scheduled trial date of June 16, 1987, respondents abandoned legal representation of the partnership, Cullen Development Company, and individual petitioner. Not only were the individual partners forced to represent themselves, In Pro Se, but the partnership itself was forced into, In Pro Se. Respondents

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reviewed.

9. In addition, Defendant's counsel had no idea that Plaintiff's counsel would be objecting to the discovery cut-off date, given the fact that Plaintiff was agreeing to stipulate to the filing of a Cross-Complaint within thirty (30) days of trial, and giving the fact that the Cross-Defendants will be answering the Cross-Complaint by February 10, 1987.

10. In order to adequately prepare this matter for trial, it will be necessary to depose approximately eight (8) to ten (10) witnesses prior to trial.

11. The above-stated discovery can be completed without jeopardizing the case from going to trial on February 18, 1987..."

made no explanation to the court as to who was going to represent the partnership. The purpose of said substitution of legal representation by respondents, was a **last effort delay tactic** by respondents to continue the June 16, 1987, trial date. At this time petitioner was not aware that respondents had completely failed to prepare petitioner's case for trial.

On June 8, 1987, respondents called petitioner, who was residing in Arizona, stating that the court would require a Declaration from petitioner in order to hear a Motion to Continue the scheduled trial date. Respondents dictated the contents of said Motion (dated June 8, 1987) that respondents requested. Two critical statements in the Declaration were that petitioner allegedly owed respondents legal fees, and that, petitioner desired to be placed, In Pro Se. Each of these statements were fabricated by respondents in order to delay the pending trial date.

At the time of this Declaration,

respondents knew that the firm was paid in full, with extra monies still on retainer.

Then respondents drafted the Motion to Continue the June 16, 1987, trial date and on June 11, 1987, respondents made a Special Appearance on petitioner's behalf, anticipating that the Motion would be granted, but the court denied said Continuance.

On the morning of June 16, 1987, petitioner continued the morning trial by making a California Civil Code of Procedure §170.6 Motion to recuse the first assigned judge from the case. The case was then trailed to an afternoon hearing on the same date. Shortly thereafter on the advise of respondents, petitioner as an individual, filed a voluntary Chapter II Bankruptcy Petition with the Federal Bankruptcy Court (Eastern Dist.) before appearing at the afternoon trial on June 16, 1987.

The sole purpose of petitioner's Chapter II filing was to initiate the automatic stay of

litigation of the Housing Authority case. Petitioner, thought, and was led to believe by respondents, that the filing of the Chapter II Petition would stay the Housing Authority trial as it related to petitioner and Cullen Development Company. Petitioner attended the trial, on the afternoon of June 16, 1987, for the sole purpose of having the Federal Bankruptcy Automatic Stay Petition read into the court record. Judge Morris promptly ordered the Petition into the record.[4]

On June 16, 1987, before the trial against unrepresented, individual and partner James Cullen commenced, James Cullen stated he would voluntarily default as he was not prepared, nor capable of representing himself, much less the partnership Cullen Development Company. Petitioner did not actively participate in the trial of June 16, 1987, as it related to unrepresented Cullen Development Company and/or

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[4] Mark Cullen presented a copy of his Bankruptcy Petition filed on June 16, 1987. The court thereafter ordered no further action be taken against Mark Cullen.

himself. Petitioner did request to help translate a few times for James Cullen who suffers from a reading and speech impediment.[5]

On June 16, 1987, after an approximately 15 minute trial, Judge Morris entered a Judgment against James Cullen and Cullen Development Company.[6] However, the trial judge made very clear that the judgment rendered was to have no effect on Mark T. Cullen.[7]

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[5] "MARK CULLEN: Your Honor, my brother has a little speech problem; do you mind if I speak for him?

THE COURT: Well let me determine to what extent you have this speech problem. Mr. James Cullen, have you understood all we have said here?

MR. JAMES CULLEN: Not really. It's all above my head this level deal."

THE COURT: After Mr. Cullen has had a chance to examine the document.

MR. JAMES CULLEN: Can I get this read to me? My reading is real bad.

[6] This judgment is set forth in Appendix K. Pursuant to Rule 201 of the Federal Rules of Evidence, petitioner respectfully requests the Court take Judicial Notice of the above-referenced judgment.

[7] "MR. MARK CULLEN: Your Honor, I wouldn't agree that it was against me if I am still a part.

THE COURT: James Cullen and Cullen Development Company.

MR. MARK CULLEN: I'd like the record to state that clearly.

THE COURT: This record states that, . . ."

On April 20, 1988, the California State Contractors License Board caused the California State Attorney General to file an Accusation against Cullen Development Company, and the three individual partners, under various provisions of the California Business and Professions Code. On May 16, 1988, petitioner and Cullen Development Company filed a General Denial to the Contractors State License Board Accusation. The Contractors State License Board Complaint was litigated, in a Judicial Trial Format, for eighteen days in 1989. The Contractors State License Board was represented by Deputy Attorney General June Long, and petitioner represented the partnership and himself, In Pro Se. Testimony was presented by more that eighteen witnesses and over 425 evidentiary documents were entered into evidence. **The Administrative Law decision found, inter alia, that the Housing Authority breached the Rio Linda Contract, that the Housing Authority breached five Implied**

Covenants, that the **Housing Authority committed Negligent Misrepresentation**, and that the **Housing Authority committed Fraud in Labor Compliance**. On July 25, 1990, the Registrar of Contractors, David R. Phillips, accepted Administrative Law Judge Smith's decision as a **Final Judgment**. (See Appendix J) No appeal was taken by either party. Therefore, after 30 days it became a final order of the court.[8]

It is important to note that this was the first decision as it relates to petitioner on either the complaint or cross-complaint.

On August 14, 1990, petitioner filed a Motion for Leave to File an Amended Cross-Complaint (in the Housing Authority v. Cullen case), accompanied by a Memorandum of Points and Authorities in support thereof, in an effort to

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[8] "The decision became effective 30 days after it was mailed to the respondent [Cullen] unless a reconsideration is ordered within that time ...." Government Code, Title 2 Div. 2, §11519 (a).

Pursuant to Rule 201 of the Federal Rules of Evidence, petitioner respectfully requests that the court take Judicial Notice of the above-referenced decision.

remedy the negligent **and fraudulent** conduct of respondents. On August 30, 1990, the Housing Authority filed an Opposition to petitioner's Motion. Petitioner filed a Reply on September 4, 1990. On September 7, 1990, Superior Court Judge Gray denied petitioner's Motion for Leave to File an Amended Cross-Complaint, on grounds of the court's discretion. Judge Gray referred to the prior stipulation that was entered by the Cullen attorneys.[9]

This was the first time that individual petitioner suffered actual injury as it relates to California's Legal Malpractice Statute (Civil

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[9] "THE COURT: Well, Mr. Campbell, among other reasons for exercising discretion against allowing the amendment was the fact that it was carefully stated in your moving papers how the decision not to add this cross-complaint or to litigate this matter was a tactical decision that was made by the parties. And having made that tactical decision, I think the parties should live with it.

MR. CAMPBELL: Yes, your Honor. The stipulation that was entered at a time just a matter of days before the first trial date. . . ."

After argument by petitioner the court further stated:

"THE COURT: I'm saying that you've made your bed and you can lie in it."

Code of Procedure §340.6).

On September 19, 1990, respondents sent petitioner a letter referencing a recent Sacramento Bee newspaper article wherein petitioner's favorable Administrative Law decision was written about. Respondents offered to provide legal services to petitioner in the upcoming trial.[10]

On September 26, 1990, the Housing Authority filed a Motion for Summary Judgement on petitioner's individual remaining Cross-Complaint on the Rio Linda Contract. Petitioner filed an Opposition to the Motion for Summary Judgment on October 16, 1990. The Housing Authority filed a Reply to petitioner's Opposition on October 25, 1990. Thereafter, on October 30, 1990, Judge Gray granted Summary

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[10] In pertinent part:

"I know you must be very happy to have turned the tide and to accomplish this first large step in vindicating the rights of you personally and Cullen Development Company.

The article indicated that you have a November trial date with Mr. Bleier. If you are still in pro per in that litigation, I would be pleased to respond to any inquiries you might have with respect to appropriate litigation strategy."

Judgment against individual petitioner. The result of this judgment was that petitioner's remaining Cross-Complaint against the Housing Authority was finally dismissed.

Soon thereafter, a trial date was scheduled for February 11, 1991, for the Housing Authority's remaining Complaint against individual petitioner on the Rio Linda Contract.

The trial began February 11, 1991. One and one-half days into trial, Judge Morris made a ruling on a Motion in Limine (presented by Housing Authority Attorney Campbell), wherein petitioner was disallowed the opportunity to allege his affirmative defenses against the Housing Authority. In effect, petitioner was finally denied the right to have the Housing Authority v. Cullen case tried by the Superior Court in an actual trial format.[11] Before concluding the trial, Judge Morris took under consideration petitioner's Oral Motion that the

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[11] Petitioner was procedurally barred from presenting his case-in-chief. Further, petitioner was barred from the opportunity to even present a defense.

prior Administrative Law Judgement should have a Collateral Estoppel effect on the Housing Authority's complaint against individual petitioner.

Judge Morris ruled for both the Housing Authority and petitioner to present Post Trial Briefs arguing the issue. On April 4, 1991, Judge Morris ruled on the Collateral Estoppel Issue in favor of the Housing Authority.

On April 4, 1991, the Housing Authority's individual judgment against petitioner was filed into the record. Appendix I of Appendix.

On May 29, 1991, petitioner filed an Appeal in the Housing Authority v. Cullen, et.al., case. Third District Court of Appeals: 3 Civil No. C011217.

On November 20, 1992, Honorable Justice Davis, with the Third District Court of Appeals, rendered a 22 page decision, on the one hand, affirming petitioner's denial of a "trial on the merits" in the underlying Superior Court action. But on the other hand, Justice Davis stated:

> **"Indeed, in light of the findings of the CSLB's administrative law judge, this is not a case where the result bespeaks "justice" in an abstract sense since SCHA is being permitted to recover from a breach occasioned by its own obstructionist bureaucratic conduct."** (See Appendix H, pp. H-31-B32)[12]

The resultant effect of the Housing Authority case is as follows: petitioner has lost in excess of 2.7 Million dollars (1985 value) and has incurred judgements against him in excess of $2 Million by certain sureties and others. In addition the petitioner has incurred a judgment, of $367,000 in favor of the Housing Authority, against petitioner for Breach of Contract while at the same time the Appellate Court states, it believes the Housing Authority breached the contract. Administrative Law Judge Smith (after 18 days of trial, over 18 witnesses, and in excess of 425 documentary exhibits) found in his decision, that the Housing Authority breached the Rio Linda Contract. (Appendix J)

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[12] Appendix H of appendix. Pursuant to Rule 201 of the Federal Rules of Evidence, petitioner respectfully requests the Court to take Judicial Notice of the above-referenced decision.

Succinctly stated, petitioner has been denied the opportunity to present his evidence, or a defense, in the trial court and a judgment has been rendered against him. While at the same time, the facts of the case have proven that the Housing Authority was at fault.

B. The underlying legal malpractice and fraud claims by petitioner against respondents.

On April 29, 1991, petitioner and Cullen Development, a general partnership, filed a Complaint for Damages for Legal Malpractice, and Fraud, against the Law Offices of Trainor, Robertson, Smits & Wade, and Charles Trainor, Stuart Smits, William Davis, Dave Robertson, and Gary Funarmura, individually. Respondents employed attorney Henry Crowle to represent the law firm and each of them individually. On May 30, 1991, respondents filed a Demurrer to the Complaint. The Demurrer Hearing was set for July 2, 1991. On June 25, 1991, petitioner filed a Notice of Opposition to Demurrer; Points and Authorities in Support Thereof; Declaration

of Mark T. Cullen; and Judicial Notice in Support Thereof.

On June 27, 1991, respondents requested ex-parte, and were granted an Extension of Time to file a Reply to petitioner's Opposition to Demurrer. Thereafter, on June 28, 1991, respondents filed a Notice of Change of Hearing Date. On July 9, 1991, respondents filed a Reply to petitioner's Opposition to Demurrer.

The First Demurer by the Trial Court in Cullen v. Trainor was, again, considered by Judge Gray.

On July 10, 1991, Judge Gray made the following Tentative Ruling:

> "22. CULLEN DEVELOPMENT CO. V. TRAINOR, ROBERTSON, ETC.
> Demurrer to complaint of Cullen Development Company sustained without leave to amend. Demurrer to third count (breach of contract) sustained for failure to state whether the alleged contract is oral or written. Demurrer to 1st, 2d, and 4th counts sustained with leave to amend based on the statutes of limitations. 10 days to amend, 10 days thereafter to respond."

On July 11, 1991, Judge Gray ordered his

Tentative Ruling accepted. Thereafter, on July 16, 1991, the Order was Noticed and filed.[13]

Next, on July 29, 1991, petitioner filed a First Amended Complaint for Damages for Legal Malpractice. On July 22, 1991 (Filed August 1, 1991), petitioner mailed Judge Gray a letter, bringing to the court's attention a conflict between the Court's Tentative Ruling and the Order Filed.[14] Then, on July 31, 1991, petitioner sent a confirming letter to the court (confirming a telephone conversation between the Bailiff and petitioner) wherein the Bailiff stated Judge Gray recognized the conflict and that the Filed Order would prevail. Next, on August 6, 1991, petitioner and respondents stipulated to allow petitioner to File a Further Amended First Amended Complaint. The

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[13] See Appendix E of appendix. Pursuant to Rule 201 of the Federal Rules of Evidence, petitioner respectfully requests the Court take Judicial Notice of the above-referenced case.

[14] The tentative ruling barred petitioner from filing a cause of action based on breach of contract. The Final Order granted petitioner the opportunity to refile a cause of action based on breach of contract.

Stipulation was so Ordered by the Court.

On August 15, 1991, petitioner filed his Further Amended First Amended Complaint for Damages for Legal Malpractice and fraud.

Thereafter, on August 27, 1991, respondents filed a Notice of Demurrer, and other supporting documents. Then, on September 16, 1991, petitioner filed a Notice of Opposition to Demurrer and supporting documents. On September 20, 1991, respondents filed a Reply Memorandum of Points and Authorities in Support of Demurrer.

The second Demurrer by the trial court in Cullen v. Trainor was also considered by Judge Gray. On September 24, 1991, Judge Gray made a Tentative Ruling sustaining respondents' demurrer.[15] Petitioner requested a hearing on the tentative ruling and one was calendared for the next morning. Thereafter, on September 24,

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[15] "This matter argued by counsel and submitted. Demurrer sustained without leave to amend for failure to state a cause of action. The statute of limitations has expired. Johnson v. Simonelli 1991 231 Cal. App. 3d 105"

1991, petitioner and respondents submitted Oral Argument to the court. Judge Gray affirmed his Tentative Ruling. Then, on September 27, 1991, an Order and Judgment of Dismissal Re: Demurrer, was filed.[16]

On November 20, 1991, petitioner filed a Notice of Appeal.

C. The Court of Appeal's first decision in Cullen v. Trainor.

The appellate court's first decision affirmed the trial court's judgment of dismissal against petitioner. See Appendix C. The opinion held, as to the commencement of the statute of limitations for Legal Malpractice:

> "We will conclude that the statute of limitations began on the date the judgment in the underlying action was entered against the partnership of which Cullen was a member, October 13, 1987, for that is the date upon which he suffered injury to his interests." Appendix C, p 2[17]

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[16] See Appendix D of appendix.

[17] Although the trial was held June 16, 1987, the judgment was not correctly filed until October 13, 1987.

Secondly, as to the commencement of the statute of limitations for Actual Fraud:

> "We also will conclude that the limitations period was not tolled by reason of an alleged fraud in the nondisclosure of defendants' failure to meet the claim statute, an alleged predicate to success on the cross-complaint brought in the Housing Authority action, because such a fraud was not the legal cause of the injury sustained." Appendix C p. 2

In rebuttal to this decision, petitioner petitioned the appellate court for rehearing on the following grounds:

One, the appellate Court's opinion failed to differentiate between a partnership cause of action for legal malpractice and an individual cause of action for legal malpractice. Secondly, the opinion failed to address the three other projects, whereupon, the respondents also committed actual fraud in respondents' concealment of their failure to file claims under the Government Claims Act.

D. The Court of Appeal's Second Decision in Cullen v. Trainor.

The appellate court stated:

> "His sole noteworthy complaint is that the opinion's principal theory of resolution of his fraud claim does not squarely extend to part of his case. While the point has arguable merit, the underlying claim has no merit for reasons that closely parallel those given in the

opinion." (Appendix B, p. 1-2)

Then the appellate court stated:

> "Cullen knew in 1987 that the cross-complaint prepared by defendants did not put in issue the other three contract causes of action. He took no action to pursue these causes until 1990. Assuming for the sake of discussion that defendants concealed a failure to file government tort claims concerning these contracts, no harm to Cullen can be attributed to this delict." (Appendix B, p. 4)

Further the appellate court held:

> "Defendants' failure to disclose that they had not filed government tort claims did not prevent Cullen from pursuing these causes of action on a theory sounding in contract. Having slept on his rights sounding in contract, if any, to recover from the Housing Authority for the breach of these three contracts, Cullen cannot recover from his former counsel for failing to perfect a potential alternative remedy, for the reasons given. The petition for rehearing is denied." (Appendix B, pp. 5)

Petitioner, petitioned the California Supreme Court to review the Cullen v. Trainor, et al. case and that request was denied on March 31, 1993. See Appendix A of appendix.

REASONS FOR GRANTING WRIT

I.
CALIFORNIA'S STATUTE OF LIMITATION FOR LEGAL MALPRACTICE (CIVIL CODE OF PROCEDURE §340.6) IS UNCONSTITUTIONAL AS IT VIOLATES DUE PROCESS SINCE THE STATUTE IS VAGUE AS TO THE MEANING OF ACTUAL INJURY.

The statute of limitations for legal malpractice in California may be found in West's Annotated Civil Code of Procedure Section 340.6:

> (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discover, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
>
> (1) The plaintiff has not sustained actual injury;
>
> (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
>
> (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney,

> except that this subdivision shall toll only the four year limitation; and
>
> (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.
>
> (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

The meaning of the words "Actual Injury" has been the subject of multiple interpretations as a result of numerous lawsuits preceding California's landmark case of Laird v. Blacker (1992) 2 Cal.4th 606.

In the Laird case, the California Supreme Court held:

> "We conclude the limitations period of section 340.6 commences when a client suffers an adverse judgment or order of dismissal in the underlying action on which the malpractice action is based." Id. p. 609.

It seems clear from C.C.P. §340.6, and its Laird case interpretation, that in order for the statute of limitations for legal malpractice to commence running, (1) the client must discover

the malpractice, and (2) also suffer "actual injury" from the malpractice.

It took the California Supreme court, in the Laird case, 16 pages to explain the meaning of two words: "actual injury". The meaning is **still not clear** and has resulted in numerous lawsuits since the Laird decision.

> "It is a general principle of statutory law that a statute must be definite and certain to be valid. A statute that either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at the meaning of the statute, and differ as to its application violates the first essential of due process of law." 13 Cal Jur 3d, Constitutional Law §294, p. 733

In his dissent to the Laird case, Justice Mosk stated:

> "The majority err in declaring (maj. opn,. ante, p.620) that section 340.6 is "clear on its face." A statute that is clear on its face does not require a lengthy opinion to expound its meaning, nor does it generate the varying interpretations seen in the case law. On the contrary, the phrase "actual injury" in section 340.6 is not self-explanatory, as noted by the State Bar in a prescient letter to the Governor. (Letter of Edward Rubin,

> Pres. of State Bar, Sept. 13, 1977, warning that the phrase was ambiguous and would lead to litigation.)" Id. p. 621

"Actual injury" has been held to be an adverse order, as compared to a final adjudication of a matter. Unfortunately, what is not clear is, at what point in the litigation do we start counting the adverse order? For example, is it the denial of a motion? A demurrer? A summary judgment motion? An order to compel? And so forth.

In petitioner's underlying Housing Authority case, the first adverse order, against petitioner, was on September 7, 1990. Notwithstanding that, the lower courts have refused to recognize that date.

A judgment was entered against the partnership entity, Cullen Development Company on June 16, 1987, although petitioner has petitioned this Court in case No. 92-1765, that the judgment should be void, ab initio.

For argument sake, if the judgment is upheld on appeal, petitioner did not expect to

be bound by the June 16, 1987, judgment. In fact, to be sure he wasn't, petitioner asked the trial judge at the end of the hearing if the judgment would have any effect on petitioner and the trial judge clearly stated that it would not. (See Footnotes 4 and 7, supra)

Appellate Justice Davis, made this same conclusion in the Housing Authority first appellate decision: "No action was taken against Mark T. Cullen on the complaint or on the cross-complaint." Appendix H, p. 8

In the underlying Housing Authority case, James Cullen could not adequately represent himself, much less the partnership entity and petitioner. Petitioner therefore, did not receive his due process protection guaranteed under the constitution.

> "Nevertheless, due process requirements must be met. The non party must have had an identity or community of interest with, and adequate representation by, the losing party in the first action; and the circumstances must have been such that the nonparty expected to be bound by the prior adjudication." Lynch v. Glass (1975) 44 Cal. App.3d

948. (7 Witkens, (3rd ed.) Judgements Section 288 (c)).

In the underlying Trainor case, the Housing Authority judgment against the partnership entity, has been used by the trial court to commence the statute of limitations for legal malpractice as to petitioner's individual claim. Neither CCP §340.6 nor the Laird case infer that a judgment against one individual [Cullen Development Company] can be used to commence the statute of limitations against another individual [petitioner]. Either the lower courts have misapplied the malpractice statute or given the statute interpretation beyond the plain meaning of the words.

Subsequent to the Laird case, just as Justice Mosk predicted, several lower courts have interpreted the meaning of "actual injury" in a variety of ways:

In Sirott v. Latts (May 1992) 6 Cal. App. 4th 923, a case which involved a retiring doctor whom, it appears, received bad legal advise in regards to the purchasing of "tail" insurance

for medical malpractice, the court held:

> "Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue. [¶] Indeed, once having discovered his attorney's negligence and having suffered some damage, the client must institute his action within the time prescribed . . ." Id. p. 930

In Stoll v. Superior Court (Sept. 1992, First Dist., Div. Five) 9 Cal.App.4th 1362, a case which involved a rather unique approach by plaintiff to extend the time to commence his suit against defendants by using a "fiduciary duty" attack, the court held:

> "the action is time barred, since the corporation had knowledge of facts constituting the cause of action more than one year before filing the action, . . . " Id. p. 1362

In Finlayson v. Sanbrook (Nov. 1992, Sixth Dist.) 10 Cal. App. 4th 1436, a case which involved an action wherein the defendant attorneys missed a statute of limitations in an underlying case, the court held:

> ". . . that the one-year limitations period of Code Civ. Proc., §340.6, commences when the

> statute of limitations for the underlying cause of action expires in cases of attorney malpractice predicated on missing a statute of limitations. The fact of damage is apparent when a right or remedy is lost due to an attorney's failure to file within a statutory limitation. Plaintiff's attempts to "remedy" some of the harm by filing a third party action did not delay accrual of the statute of limitations, the court held, since once plaintiff's right was lost, he was damaged even though the amount of his damages had not been ascertained. The focus of the statute of limitations for legal malpractice should be on discovery of the fact of damage, not the amount." Id. p. 1346

In Hensley v. Caietti (Feb. 1993, Third Dist.) 13 Cal. App. 4th 1165, a case which involved client dissatisfaction with a marital settlement agreement, the court held:

> ". . . that the trial court properly concluded that plaintiff suffered actual injury on the date of entry into the marital settlement agreement, even though some or all of the provisions were to be subsequently incorporated in a judgment." Id. p. 1165

In Safine v. Sinnot (May 1993, First Dist., Div. One) 15 Cal. App. 4th 614, a case which involved an attorney suing his client over legal

fees and a subsequent cross-claim by the client for malpractice, the court held:

> ". . . that the claim for attorney malpractice based on an erroneous amount in a judgment payable by plaintiff was barred by the statute of limitations (Code Civ. Proc., §340.6). The limitations period was not tolled until the date when the corrected judgment was reversed on appeal; that an appeal has been taken does not alter that fact that an adverse judgment injured the client."

In Kovacevich v. McKinney & Wainwright (June 1993) 93 Daily Journal D.A.R. 6983, a case which involved a group of attorneys, and others, hoodwinking a farmer into guaranteeing a line of credit for a proposed private bank that failed, the court held:

> "Under section 340.6, the one-year statute of limitations for legal malpractice does not begin to run until a plaintiff knows of the attorney's negligence and sustains actual and appreciable harm. [Footnote omitted]" Id. p. 6983

Neither petitioner nor other plaintiffs, in legal malpractice actions, can receive due process of law under a statute that is not clear as to its meaning. As Civil Code of Procedure

§340.6 has shown, as reported in case after case, the courts have been free to interpret the meaning (ie., legislate the law). This type of adjudicating is not fair and equal protection of the law as constitutionally guaranteed. In fact, one could justifiably take the position that there is an underlying agenda to protect attorneys, from liability, notwithstanding the fact they have committed legal malpractice.

The Court has not sanctioned the denial of due process of law. As this Court has stated:

> "As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism the "*some* form of hearing" is required before the owner is finally deprived of a protected property interest. Board of Regents v Roth, 408 US, at 570-571, n8, 33 L. Ed2d 548, 92 S Ct 2701 (emphasis in original)." Logan v. Zimmerman Brush Company (1982) 455 US 422, 433, 71 L.Ed2d 265, 102 S Ct 1148.
>
> "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting

to redress grievances. Id. p. 429

In the Logan case, Justice Powell, with whom Justice Renquist joins, concurring in the judgment, stated:

> "It is necessary for this Court to decide cases during almost every Term on due process and equal protection grounds. Our opinion in these areas are often criticized, with justice, as lacking consistency and clarity. Because these issues arise in various settings, and opinions are written by each of nine Justices, consistency of language is an ideal unlikely to be achieved." Id. p. 443 Fn.

Any statute should be written clearly, concisely, and be able to withstand scrutiny as to whether it violates "due process" under the United States Constitution.

> A statute violates due process "if it is so vague and standardless that is leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. [Citations.]" Giaccio v. Pennsylvania (1966) 382 U.S. 399, 402-403, 15 L ed 2d 447, 86 S Ct 518

Petitioner respectfully requests that the Court grant review of this case to decide if

California Civil Code of Procedure §340.6 is unconstitutionally vague.

II.
SINCE A PARTNERSHIP IS A SEPARATE LEGAL ENTITY THE APPELLATE COURT FAILED TO DIFFERENTIATE A PARTNERSHIP CAUSE OF ACTION FROM AN INDIVIDUAL CAUSE OF ACTION AS IT RELATES TO THE STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE UNDER C.C.P. §340.6.

The trial court is a state actor, and is mandated to enforce the constitutional rights of each individual (including petitioner) that are guaranteed under the United States Constitution and a state Constitution. Trial courts must afford petitioner, as well as a partnership legal entity, the constitutional safeguards of the due process clauses of the Fourteenth and Fifth Amendments, as well as Equal Protection of the laws under the Fourteenth Amendment.

A partnership, like a corporation, is a separate legal entity. As such, a partnership, like a corporation, can incur a judgment, separate from an individual member partner.

> Partnerships are defined under California Corporations Code Section 15006: (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.
>
> California Code of Civil Procedure Section 388, in pertinent part states: (a) Any partnership or unincorporated association, whether organized for profit or not, may sue and be sued in the name which it has assumed or by which it is known.

There is no question that the law, and case history, over the years regarding partnerships is contradictory and sometimes confusing. Justice Blease's opinion (Appendix C), twice mentions the exceptional recognition of a partnership "entity" theory, but goes on to hold that a partnership is really not a separate legal entity. The appellate court, clearly erred finding that petitioner's individual interests were the same as his partnership interests.

Petitioner asserts that a partnership (i.e., an individual) and an individual [Petitioner] can each be a real party in interest. (See generally 5 Witkin, Calif. Proc.

3d, Pleading §856, p. 299, C.C.P. §579) As such, "Since different individuals suffering personal injury obviously have separate legal rights, it followed that any such claimant had a separate cause of action that did not effect another claimant." Civil Procedure, 3rd ed. James, Hazard (1985) p. 477.

In support of petitioner's legal conclusion, this Court has taken the opportunity, in a criminal case, to previously set forth guidance on this issue.

In the United States v. A. & P. Trucking Co. (1959) 358 U.S. 121, 79 S.Ct. 203, 3 L.Ed.2d 165, this Court held:

> " . . .that a partnership can violate each of the statutes here in question quite apart from the participation and knowledge of the partners as individuals. The corollary is, of course, that the conviction of a partnership cannot be used to punish the individual partners, who might be completely free from personal guilt. As in the case of corporations, the conviction of the entity can lead only to a fine levied on the firms assets."

In the Trucking Co. case, two partnerships

were charged as entities, in separate informations with violations of 18 U.S.C. §835, 18 U.S.C.A. §835, which makes it criminal knowingly to violate Interstate Commerce Commission regulations for the safe transportation in interstate commerce of "explosives and other dangerous articles." The District Court dismissed, on motion, the informations on the ground that a partnership entity cannot be guilty of violating the statutes involved. **The Court found that partnerships are entities and that judgments, or fines, can be rendered against these entities separate from the individual partners.**

California case law and public policy, lend support to the emerging position that a partnership is a separate legal entity. In Epstein v. Frank (1981) 125 Cal.App.3d 111, held:

> ". . . a limited partnership is regarded an entity separate and apart from its partners when it is sued, when it is served with process, and when executing upon its assets. We can perceive of no compelling reason

> why, in determining the applicability of Code of Civil Procedure section 351, it should not be regarded as an entity, which, like a corporation, is considered . . ." Id. p. 120

The Epstein case goes on further to state:

> "A partnership, however, is not always regarded as an aggregate of individuals. The authorities are replete with instances where the partnership is considered an entity. (See 6 Witkin, Summary of Cal. Law (8th ed. 1974) Entity and Aggregate Theories, §14, pp. 4264-4265.)" Id. p. 119

> "In the area of procedures, a partnership is treated substantially the same as a corporation [Fn 4 omitted], and an entity concept predominates. Thus in order to acquire jurisdiction over a partnership the partnership entity must be designated as the defendant, and the naming of the individual partner is not sufficient. [Citations omitted] The interest of an individual partner in partnership assets is not subject to attachment or execution except on a claim against the partnership. [Citations omitted]." Id. pp. 119-120

Petitioner's position is further supported by Evans v. Galardi (1976) 16 Cal.3d 300 wherein the California Supreme Court held:

> ". . . we need only point out that a limited partnership is viewed as an entity separate and apart from

> the limited partners for purposes of suing and being sued. (Code of Civ. Proc. §388. subd. (a); §15526.)[Fn 16 omitted] The limited partner is not a proper party to proceedings by or against the limited partnership (§ 15526), and the limited partnership is not involved in suits against the limited partners in their individual capacity." Id. p. 311

In People v. Sobiek (1973) 30 Cal.App.3d 458 the court held:

> "Under traditional legal concepts the partnership is regarded as an aggregate of individuals with each partner acting as agent for all other partners in the transaction of the partnership business, and the agents of the partnership acting as agents for all of the partners." [Citation omitted] Id. p. 467

> "Thus, given the recent trend in the law in recognizing unincorporated associations as separate legal entities . . ." Id. p. 468

In Promotus Enterprises, Inc. v. Jiminez (1971) 21 Cal.App.3d 560, the court held:

> "We are supported in our conclusion by a recent partnership decision of our Supreme Court, Fazzi v. Peters, 68 Cal.2d 590, wherein a copartnership was sued and service was made on all of the partners individually. As the action named only the copartnership as a defendant and did not name as defendants either of the partners individually, the

> court held that a judgment in personam could not be entered against one not a party to the action and voided the judgment against the individual partners." Id. p. 566

In Fazzi v. Peters (1968) 68 Cal.2d 590, this Court held:

> ". . . an individual judgment may not be rendered against a partner not joined as a defendant in an action against the partnership of which he is, or is alleged to be, a member [Fn 7 Omitted]". Id. p. 597

In addition, there is other sound legal support to conclude a partnership is a separate legal entity, distinct from its individual members.

First, by statute a partner, not licensed to practice law, to a general partnership cannot represent the partnership in legal matters, In Pro Se. (See Calif. B&PC §6125[18])

> "Corporations and partnerships both of which are fictional legal persons, obviously cannot appear for themselves personally. With regard to these two types of business associations, the longstanding and

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[18] "No person shall practice law in this State unless he is an active member of the State Bar." Deerings, B&PC §6125, Page 389.

> consistent court interpretation of §1654 is that they must be represented by licensed counsel." [Turner v. American Bar Asso. (1975, DC Tex) 407 F. Supp. 451, 476] "Corporations must be represented in court by attorneys admitted to practice, and may not apply through an officer or other lay representative." "The same rule applies to partnerships and other unincorporated associations." [First Amendment Foundation v. Brookfield (1983, ND ILL) 575 F. Supp. 1207.] Partnerships and corporations are independent legal entities. In Vann v. Shilleh (1975) 54 Cal. App.3d 192, the holding is that a corporation cannot appear in pro per. [Clean Air Transport Systems v. San Mateo County Transit Dist. (1988) 198 Cal. App.3d 576] holding that "an unincorporated association must be represented by a licensed attorney."

Secondly, the Federal Bankruptcy Courts, have continually allowed partnerships to file for bankruptcy protection, notwithstanding the fact that the individual partners do not have to file unless they become insolvent, or vise versa. (See generally 11 U.S.C. §303(3), 11 U.S.C. §723, Bankruptcy Rule 2009(e), and Bankruptcy Form 4)

> "There is no requirement that any partner in a case under Title II file under the same chapter as the

> partnership or vise versa." U.S. Code & Congressional and Administrative News 5, 95th Congress, 2nd Session 1978, page 6158.

In addition:

> "A partner may file a voluntary case under II U.S.C. 301 whether or not the partnership is a debtor under a case under Title II." U.S. Code & Congressional and Administrative News 5, 95th Congress, 2nd Session 1978, page 6158.

Third, and finally, the underlying trial court determined that petitioner had individual claims separate from the partnership Cullen Development Company. On June 16, 1987, Judge Morris stated:

> "Mark Thomas Cullen has just filed with the court a voluntary petition in bankruptcy under chapter eleven, which was ordered filed in the federal bankruptcy court at 1:20 P.M. this day, and Mr. Mark Cullen, who's present together with James Cullen, has lodged that with the court, and I [the court] will order it filed as a record of this case. That precludes any further proceedings against defendant Mark Thomas Cullen."

At that point, Judge Morris protected petitioner's individual rights as to the complaint, against petitioner, and petitioner's

cross-complaint against the Housing Authority.

Therefore, petitioner suffered no "actual injury" by reason of the adverse judgment of 1987 because the action was stayed with respect to his individual liability and his cross-complaint against the Housing Authority.

Witkin, also concurs that if there are separate and distinct interests that they are separately appealable.

> "It is well settled that where parties have distinct interests there can be a separate, final and appealable judgment for each." 9 Witkins, California Procedure, Appeals, Section 49, page 74.

So too, should the partnership, Cullen Development Company and petitioner have had separate causes of action for legal malpractice against respondents because both individuals were separately represented by respondents.

This should lead to the correct legal conclusion that a partnership or other unincorporated association capable of suing or being sued as "an entity" in the State in which an action is brought should be deemed a citizen

of the State where it has its principal place of business, whether such action is brought by or against such partnership or other unincorporated association or by or against any person as an agent or representative thereof.

Notwithstanding the fact that a judgment was entered against the partnership, Cullen Development Company on June 16, 1987, no judgment was entered against individual petitioner until September 7, 1990. According to the California Statute of Limitations for legal malpractice, petitioner had suffered no "actual injury" in the underlying Housing Authority case until the above-referenced date.

The appellate court correctly focused into the heart of the issue in deciding when petitioner sustained actual injury. The problem is, the Appellate Court in the two underlying cases (Housing Authority v. Cullen and Cullen v. Trainor) came to two diametrically opposed opinions as to when petitioner suffered actual injury.

> "The question is when did Cullen "sustain actual injury" within the meaning of that statute. Defendants argue that Cullen sustained injury in 1987 when the adverse judgment was entered against Cullen Development Company, among other reasons, because "his interest in the partnership claims against the Housing Authority were [sic] lost and he had sustained injury at that time." The argument is persuasive." Appendix C, p. C-12-13

This conclusion by Appellate Justice Blease is in complete contrast to the Housing Authority v. Cullen appellate decision by Appellate Justice Davis, wherein Justice Davis held:

> On June 16, 1987,"no action was taken against Mark T. Cullen on the complaint or on the cross-complaint." Appendix H, p. 8

The contradiction of these two decisions focusses on the confusion between the partnership, Cullen Development Company's, cause of action for legal malpractice and petitioner's individual cause of action for legal malpractice.

Petitioner respectfully suggests the appellate court erred in finding petitioner sustained "actual injury" under Civil Code of

Procedure §340.6 at the same time the partnership did since petitioner had a separate cause of action. Petitioner's case went on for approximately four years before his cause of action for legal malpractice against respondents became ripe.

The partnership Cullen Development Company, as a legal entity, could have brought a lawsuit for legal malpractice against defendants (on or after June 16, 1987), but not petitioner, as an individual, since petitioner had suffered no individual "actual injury". (See generally CCP §340.6 and Laird v. Blacker (1992) 2 Cal.4th 606) Simply because the partnership failed to assert its legal rights does not bar petitioner from asserting his individual legal rights. Petitioner suffered "actual injury" on September 7, 1990, as pleaded. Since petitioner had suffered no injury, until this time, petitioner, on April 29, 1991, timely filed his action for Legal Malpractice against respondents.

The court, in Laird v. Blacker 2 Cal.4th

606, 615 (May 1992), held that:

> ". . . under section 340.6, the statute of limitations for legal malpractice actions commences on entry of adverse judgment or final order of dismissal."

Petitioner respectfully requests that the Court grant review of this case to decide if petitioner and Cullen Development Company have separate causes of action for legal malpractice against respondents.

III.
PETITIONER HAS BEEN DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW SINCE THE LOWER COURTS HAVE BARRED PETITIONER FROM BRINGING A CAUSE OF ACTION FOR FRAUD AGAINST RESPONDENTS.

Respondents voluntarily agreed to provide legal representation for petitioner, individually, and the partnership, Cullen Development Company, in the underlying Housing Authority case. Respondents were employed to answer the complaint by the Housing Authority and file cross-complaints for petitioner and Cullen Development Company on four separate contracts.

As a prerequisite to the filing of a cross-

complaint on three of the contracts the respondents were under an obligation to file claims[19] with Sacramento County before any legal action was commenced on the three projects.[20]

It should distinguished, a claim was not required to be filed for the Rio Linda contract because the Housing Authority was the plaintiff.

Respondents failed to file the required claims, and thereafter, concealed this fact from petitioner.

Fraud is defined as:

> "An intentional perversion of truth for purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal

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[19] California Government Code §§ 900 et. seq. Deerings California Codes.

[20] Those three projects being the South Sacramento Family Residence, the North Highlands Family Residence, and the Elk Grove Family Residence.

> injury." (Emphasis added). [Blacks Law Dictionary, 5th Ed. 594.]

Once respondents discovered their error, a date upon which petitioner is uncertain, respondents practiced damage control and concealed from petitioner their negligence.

After petitioner's discovery of respondents' concealment in August 1989, petitioner timely filed an action for fraud against respondents.

California Civil Code of Procedure Section 338 sets forth the statutory limitation for, inter alia, fraud or mistake, as three years. In pertinent part CCP §338 (d):

> "An action for relief on the ground of fraud or mistake. The cause of action in the case is not to have been deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Deering's California Codes, annotated.

Petitioner filed his cause of action for fraud against respondents on April 29, 1991, well within the required statutory period.

The appellate court's decision held:

". . . Cullen's argument fails for the reason that the alleged fraud was not the legal cause of his injuries." (AD1 p.12) In support of that argument, the appellate court relied simply on Rest. 2d Torts, §432, subd. (1) "[T]he actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent." Appendix C, p. C-19

Then the appellate court's decision states:

"Cullen seeks to prize off a tort theory of liability from the contract theory which was pled in the cross-complaint. He claims the tort theory could have been brought if a governmental tort claim had been filed against the public entity." Appendix C, p. C-20

Then the appellate court held:

"Whether the cross-complaint sounded in tort or in contract or both, it advanced but one cause of action. Had the defendants done what Cullen says they should have done, i.e., timely filed a tort claim and amended the cross-complaint to advance this as an additional but alternative theory of recovery, the unfavorable default judgment nonetheless would have been entered in the Housing Authority case and would have barred any subsequent action on this claim." Appendix C, pp. C-20-21

Then the appellate court's decision held:

> "The cause of harm to Cullen thus occurred at the point of entry of the judgment on the cross-complaint." Further, the appellate court's decision stated: "The alleged failure to plead the tort theory and the "fraudulent" failure to disclose the reason did not cause Cullen any harm because it cannot be said that Cullen would have recovered "but for" these wrongs." Appendix C, p. C-21

The appellate court has overlooked and wrongfully lumped four contracts together. The appellate court is correct in stating that a judgment was entered against Cullen Development Company on the Rio Linda Contract. However, no judgment was entered on the other three contracts.

These three contracts were not part of the underlying judgment entered against Cullen Development Company on June 16, 1987. Since these contracts are independent, petitioner should not be denied the opportunity to bring a cause of action for fraud against respondents.

The lower courts failed to recognize that as a prerequisite to the filing of cross-complaint by petitioner on three of the

underlying contracts respondents were statutorily required to file claims[21], with the County of Sacramento, first. The lower courts have confused these claims with tort claims. Accordingly, whether petitioner's cause[s] of action fell under contract, tort, or both, a claim was required to be filed by respondents. Respondents failed to file said claims and, wantonly and willfully, concealed this from petitioner.

In support of petitioner's position, in the Alton v. Rogers case (1954) 127 CA2d 667, the defendant attorney withheld information from his client regarding the status of a promissory note. Plaintiff- client knew the attorney was not fulfilling the promises in the year 1941. Plaintiff filed his action for fraud some 10 years later. In view of the confidential relationship that existed between the parties, plaintiff was legally entitled to rely on the many reassurances of the defendant attorney that

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[21] See Footnote 19, supra.

everything was alright, and the court held this legitimately delayed the discovery of fraud.

> "Causes of action based on fraud of attorney are not barred when brought within three years after discovery of fraud, and attorney may not successfully claim that plaintiff should have discovered fraud when he knew that loan he purportedly made to third person, at attorney's instigation, was not paid within a year as attorney had represented, and that the plaintiff should not have been so credulous as to have believed attorney's subsequent representations and continuing promises." Id. p.668

In petitioner's underlying Housing Authority case, petitioner relied on the respondents to be truthful. Petitioner had every right to believe, and did in fact believe, and follow all recommendations made by the respondents. Petitioner should not be penalized for following the guidance of the respondents and now be barred from seeking damages for respondents' incompetence, lies, and deceit. Respondents' abandonment of petitioner in the underlying Housing Authority case had no reason to excite petitioner's suspicion that the respondents had done anything wrong.

After all, respondents told petitioner that the Substitution of Attorneys and their fabricated claim that monies were owed [to the respondents] would certainly delay the pending trial date of June 16, 1987. The Court should not lose sight of who procedurally controlled the underlying Housing Authority case--the respondents.

The Knapp v. Knapp case (1940) 15 Cal.2d 237, also supports petitioner's position. This case involved the sale of real property jointly owned by two brothers. One brother sold the property and defrauded the other as to the amount of the sale, and kept more than his share, of monies, which he converted to his own use. The court held:

> ". . . a plaintiff who sues to recover damages for fraudulent representations made more than three years prior to the commencement of his action is required to affirmatively plead that he did not discover the facts constituting the fraud until within the statutory period of limitation. A further element of his cause of action is a statement of facts showing that he had no notice or means of knowledge

> which, if followed by inquiry, would have shown the true facts." [Citations omitted] "However, the latter requirement has been relaxed in cases involving confidential relationship, because facts which justify investigation in the ordinary case would not excite suspicion where the circumstances show a right to rely upon the representations of another and the same degree of diligence should not be required." Id. p. 242

Nothing happened in petitioner's underlying case to excite petitioner's suspicion that he was being defrauded by the respondents. Because of the existence of a fiduciary relationship between respondents and petitioner, petition had every right and justification to detrimentally rely on the statements and representations conveyed to him by respondents in the underlying Housing Authority case.

In Kimball v. Pacific Gas & Electric Company (1934) 220 C. 203, a very similar concealment [to the one petitioner alleges respondents committed] took place. Plaintiff in this case was injured in a work related injury by an employee of a company other than

plaintiff's. P. G. & E. and the other company set out on a campaign to conceal this fact from the damaged plaintiff. This concealment of the two companies was successful, until plaintiff discovered a letter that set forth the true facts and facts regarding the concealment. [So too, was respondents' concealment successful until petitioner discovered the concealment.]

The court held:

> ". . . a fraudulent concealment by the defendant of the facts upon which a legal common-law action is based, under the proper circumstances, tolls the statute until discovery and that upon discovery the statute applicable to that particular action then commences to run." Id. p. 210

The respondents set out on a similar concealment in the underlying case. Respondents failed to file required claims under the Government Claims Act. Then respondents concealed this negligent act from petitioner for over one and one-half years. Even when respondents abandoned representation of petitioner, respondents <u>continued to conceal</u>

this negligent act from petitioner.

Respondents' defense, by way of the underlying Demurrer, was that petitioner should have discovered this negligent act as soon as petitioner was substituted, In Pro Se. Respondents were under a Fiduciary Duty and Ethical Duty to disclose this concealment to petitioner. Respondents breached both of these duties.

After all, an attorney [respondents] is [are] an officer[s] of the court.

> "The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity--uberrima fides. (Cox v. Delmas (1893) 99 C. 104" 1 Witkin, California Procedure, Attorneys, Section 95 at p. 113

It is a clear violation of petitioner's right to "due process of law" to bar petitioner from litigating a valid and ripe cause of action for fraud against respondents.

This Court has not sanctioned the denial of due process of law. As the Court has stated:

"As our decisions have

> emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism the "*some* form of hearing" is required before the owner is finally deprived of a protected property interest. Board of Regents v Roth, 408 US, at 570-571, n8, 33 L. Ed2d 548, 92 S Ct 2701 (emphasis in original)." Logan v. Zimmerman Brush Company (1982) 455 US 422, 433, 71 L.Ed2d 265, 102 S Ct 1148.

> "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. Id. p. 429

In the Logan case, Justice Powell, with whom Justice Renquist joins, concurring in the judgment, stated:

> "It is necessary for this Court to decide cases during almost every Term on due process and equal protection grounds. Our opinion in these areas are often criticized, with justice, as lacking consistency and clarity. Because these issues arise in various settings, and opinions are written by each of nine Justices, consistency of language is an ideal unlikely to be achieved." Id. p. 443 Fn.

Petitioner respectfully requests the Court

grant review of this case to decide if petitioner has a valid cause of action for fraud against respondents.

CONCLUSION

No individual, whether it be a partnership, legal entity or petitioner should be denied due process and equal protection of the law under the United States Constitution, made applicable to each state through the Fourteenth Amendment.

The Court should not allow state courts, even the highest state court, to legislate the law. The separation of powers concept is deeply rooted in our system of government.

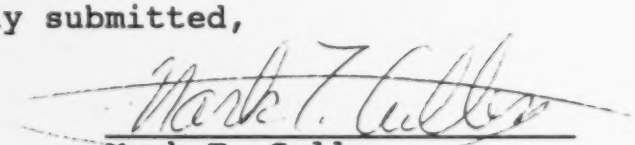
Accordingly, when a vague statute is passed into law, such as California Civil Code of Procedure §340.6, that statute should be stricken from use until the legislature writes a statute clear enough so that persons of common intelligence must not necessarily guess at the meaning. If the Court allows California's present statute of limitations for Legal Malpractice to go unchallenged, the appellate

courts will continue to be inundated with legal malpractice cases, just as they have since the Laird decision. A result that Justice Mosk legally reasoned and so accurately predicted in the Laird case.

Petitioner respectfully prays that this Court consider the grave effects when due process is denied upon the public, other general partnerships and petitioner, grant this writ, accord petitioner the process deserved, and order the California Supreme Court to reverse the Court of Appeal, Third Appellate District, to overturn the lower court's denial of Cullen's procedural DUE PROCESS right to bring causes of action for legal malpractice and fraud against respondents.

DATED: June 25, 1993

Respectfully submitted,



Mark T. Cullen
P.O. Box 1215
Shingle Springs, CA 95682
PETITIONER, IN PRO SE

APPENDIX A

Third Appellate District No. C012365
S031216

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

==========

MARK T. CULLEN, Appellant

v.

FILED: MAR. 31, 1993
Robert Wandruff Clerk

ROBERTSON, SMITS & WADE TRAINOR Et Al., Respondents

==========

Appellant's petition for review DENIED.

LUCAS

Chief Justice

APPENDIX B

NOT FOR PUBLICATION

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(SACRAMENTO)

FILED: FEBRUARY 1, 1993

MARK T. CULLEN, Plaintiff and Appellant,	
	3 Civ.C012365
	(Super.Ct.No. CV520230)
v.	
TRAINOR, ROBERTSON, SMITS & WADE, Defendants and Respondents.	

OPINION ON DENIAL

OF PETITION FOR REHEARING

Cullen petitions for a rehearing. His sole noteworthy complaint is that the opinion's principal theory of resolution of his fraud claim does not squarely extend to part of his case. While the point has arguable merit, the underlying claim has no merit for reasons that

closely parallel those given in the opinion.

Cullen had worked on four construction contracts for the Housing Authority, all of which were canceled in April 1985. The Housing Authority filed its suit, in July 1985, for breach of contract as to only one of these, the Rio Linda contract. Cullen retained the defendant law firm and they agreed to file a cross-complaint for damages for breach on all four contracts on tort and contract theories. The cross-complaint defendants filed, in February 1987, was limited to the Rio Linda contract and only presented a theory sounding in contract. As explained in the opinion, Cullen sustained actual injury when this cause of action was lost in the trial of June 1987.

Cullen represented himself thereafter. He alleged that, when he learned of the Tort Claims Act in law school in the fall of 1989, he discovered defendants had defrauded him by failing to tell him that they had impaired his opportunity to pursue tort theories on the four

causes of action. On August 14, 1990, he filed a motion to amend his existing cross-complaint, apparently seeking, inter alia, to add counts stating causes of action for damages on the other three contracts. The Housing Authority opposed this motion and it was denied.

Cullen suggests that the theory in the opinion rejecting his fraud claim for lack of causation of harm only pertains to the Rio Linda contract cause of action that had been stated in the original cross-complaint. He argues that he was defrauded by defendants concealing their failure to file government tort claims as to the other three contracts, and as to this he suffered no actual harm until the denial of his motion to amend in 1990. He submits that the statute of limitations to litigate the three other contract claims was not barred by the statute of limitations because "they relate back" to the date the Housing Authority sued him on the Rio Linda contract.

The relation back theory is untenable.

(See 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § § 1161-1162.) A claim of breach of separate contracts concerning the construction of structures at different locations is a wholly different legal liability or obligation from that stated in the original cross-complaint and cannot relate back for purposes of evading the statute of limitations.

Cullen knew in 1987 that the cross-complaint prepared by defendants did not put in issue the other three contract causes of action. He took no action to pursue these causes until 1990. Assuming for the sake of discussion that defendants concealed a failure to file government tort claims concerning these contracts, no harm to Cullen can be attributed to this delict.

These causes of action must have arisen prior to April 1985 when all of the contracts were terminated. If, as Cullen suggests, these were independent causes of action, he was free to pursue them in an independent action or to

move to amend and include them in the existing action. The failure to do so until after the expiration of the period of limitations on a action for breach of contract is the cause of any harm for loss of a judicial remedy on the causes of action. Defendants' failure to disclose that they had not filed government tort claims did not prevent Cullen from pursuing these causes of action on a theory sounding in contract. Having slept on his rights sounding in contract, if any, to recover from the Housing Authority for the breach of these three contracts, Cullen cannot recover from his former counsel for failing to perfect a potential alternative remedy, for the reasons given in the opinion.

The petition for rehearing is denied.

BLEASE, J.

We concur:

PUGLIA, P.J.

SCOTLAND, J.

APPENDIX C

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(SACRAMENTO)
FILED: JANUARY 4, 1993

MARK T. CULLEN, Plaintiff and Appellant,	
	3 Civ.C012365
	(Super.Ct.No. CV520230)
v.	
TRAINOR, ROBERTSON, SMITS & WADE, Defendants and Respondents.	

This is an appeal from a judgment following dismissal after a general demurrer was sustained without leave to amend. Plaintiff Mark Cullen seeks to prosecute a cause of action against defendants Trainor, Robertson, Smits & Wade, the law firm whose attorneys represented him during a lawsuit brought against him for breach of contracts to construct public housing for the County of Sacramento. He claims that the law

firm abandoned its defense and failed to prosecute a counter claim against the plaintiff in that action. A general demurrer was sustained on the ground that the action is barred by the statute of limitations, Code of Civil Procedure section 340.6.[22]

Cullen contends that the trail court erred in applying the statute of limitations. We will conclude that the statute of limitations began on the date the judgment in the underlying action was entered against the partnership of which Cullen was a member, October 13, 1987, for that is the date upon which he suffered injury to his interests. That date is more than one year form the date on which the complaint in this action was filed, April 29, 1991. We also will conclude that the limitations period was not tolled by reason of an alleged fraud in the nondisclosure of defendants' failure to meet the claims statute, an alleged predicate to success

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[22] References to a section are to the Code of Civil Procedure unless otherwise indicated.

on the cross-complaint brought in the Housing Authority action, because such a fraud was not a legal cause of injury sustained.

We will affirm the judgment (order of dismissal).

FACTS AND PROCEDURAL BACKGROUND

Cullen's first complaint for malpractice in this action was filed on April 29, 1991. The verified complaint was filed in propria persona, on his own behalf and in the name of Cullen Development Company, a partnership. He alleged, among other things, that Cullen Development Company suffered severe financial damages as a result of the same alleged attorney malpractice of which he complains. A demurrer was sustained to the first complaint as to Cullen Development Company without leave to amend and with respect to Cullen with leave to amend. No issue is tendered on the appeal concerning the propriety of the demurrer granted with respect to Cullen Development Company.

The demurrer we review was granted as to

Cullen's first amended complaint, styled "Further Amended First Amended Complaint" consisting of an introduction and four counts. Stripped of conclusions of law, evidentiary matter (see 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § § 338, 346), and immaterial asides the complaint makes the following material allegations of fact.

In September 1985 Cullen retained Trainor, Robertson, Smits & Wade (Counsel) to represent him in the defense and prosecution of a cross-complaint in a lawsuit brought against him by the Housing Authority of Sacramento County (Housing Authority). Cullen was led to believe that the cross-complaint would include counts stating causes of action for breach of contract and tortious breach of contract. Counsel failed to file a governmental tort claim as a predicate for the contemplated cross-complaint within the period prescribed by statute. The cross-complaint, filed on February 5, 1987, asserted only a cause of action for breach of contract.

Counsel also failed to prepare properly for trail. Counsel concealed the true reason for failing to file the cross-complaint as originally proposed and informed Cullen that the original scope of the cross-complaint could be achieved under affirmative defenses and by way of an amendment to conform to proof at trial.

Less than a month before the scheduled trial date of June 16, 1987, Counsel informed Cullen that they desired to terminate the attornment. At their request, Cullen signed the papers substituting him as his own attorney and the substitution was filed two weeks prior to trial. The day before trial Counsel advised Cullen that if the matter came on for trial as scheduled he could delay the trial by peremptorily challenging the first judge assigned and filing a bankruptcy petition to obtain a stay of pending proceedings against him. Counsel failed to inform Cullen of the proper method to file a bankruptcy when both an individual and a partnership were involved. In

terminating the attornment Counsel "again concealed their procedural errors, by not informing [Cullen] of [their] procedural errors to date."

Cullen had a meritorious defense and counterclaim in the Housing Authority lawsuit. If Counsel had acted competently in representing him he would have prevailed. During 1989 Cullen represented himself and Cullen Development Company, a general partnership operating under a general building contractor's license of which Cullen was the qualifying partner, in an administrative hearing before the Registrar of Contractors, defending against an accusation that discipline was warranted against the license because of failure to complete the contracts in issue in the Housing Authority's lawsuit without legal excuse. On June 25, 1990, the Registrar of Contractors issued a decision in the matter finding that discipline was not warranted on the ground of failure to complete the contracts because the failure was caused by

misconduct of the Housing Authority in the administration of the contracts.

On August 30, 1990, Cullen filed a motion to amend his cross-complaint in the Housing Authority lawsuit. On September 7, 1990, the motion was denied. On October 30, 1990, the court granted a partial summary judgment motion in favor of the Housing Authority denying relief under the cross-complaint. On April 4, 1991, judgment was entered against Cullen in favor of the Housing Authority.

Despite numerous opportunities to disclose their negligence in failing to file a governmental tort claim counsel failed to do so. Counsel concealed this negligence by falsely stating to Cullen, for the purpose of deceiving him, that the reason they delayed in filing the cross-complaint and filed the abbreviated version of the cross-complaint was Cullen's lack of funds. The true reasons were that counsel failed to research the Tort Claims Act in a timely fashion, failed to file a governmental

tort claim within the required time, and failed to do the research necessary to find an exception to cure their error.

Cullen relied upon the misrepresentation in believing that counsel had made a zealous effort to file the appropriate cross-complaint. He did not discover Counsel's failure to file a governmental tort claim until the fall of 1989. That ends the pertinent allegations in Cullen's complaint.

Counsel demurred contending that Cullen's first amended complaint fails to state a cause of action not barred by the applicable statutes of limitations. The demurrer attacks the complaint, viewed in the context of matters occurring in the Housing Authority lawsuit - of which judicial notice had been taken in proceedings on the earlier demurrer. The record of that litigation shows the following. The defendants in the Housing Authority lawsuit included Cullen and Cullen Development Company. When the matter came on for trial on June 16,

1987, it was stayed as to Cullen because of his bankruptcy petition filing but went forward as to the other defendants. At the conclusion of the trial, the court announced that judgment would be granted in favor of the Housing Authority against Cullen Development Company. On October 13, 1987, that judgment was entered.

After the bankruptcy stay was lifted as to Cullen the Housing Authority lawsuit proceeded as to him. The issues tendered in the cross-complaint were resolved in favor of the Housing Authority in a partial summary judgment which was based upon the theory the earlier judgment against Cullen Development Company warranted issue preclusion against Cullen.

The trial court in this action sustained the demurrer to Cullen's first amended complaint.

DISCUSSION

Introduction

I

"In reviewing the sufficiency of a

complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' (Serrano v. Priest (1971) 5 Cal.3d 584, 591, [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187].) Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (Speegle v. Board of Fire Underwriters (1946) 29 Cal.2d 34, 42 [172 P.2d 867].) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. (See Hill v. Miller (1966) 64 Cal.2d 757, 759 [51 Cal.Rptr. 689, 415 P.2d 33].) And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse;

if not, there has been no abuse of discretion and we affirm. (Kilgore v. Younger (1982) 30 Cal.3d 770, 781, [180 Cal.Rptr. 657, 640 P.2d 793]; Copper v. Leslie Salt Co. (1969) 70 Cal.2d 627, 636 [75 Cal.Rptr. 766, 451 P.2d 406].) The burden of proving such reasonable possibility is squarely on the plaintiff. (Copper v. Leslie Salt Co., supra, at p. 636.)" (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

Cullen contends that the trial court erred in sustaining the demurrer. He argues that he should not have been barred under the statute of limitations pertaining to legal malpractice, section 340.6[23], for two reasons. The first is

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[23] Section 340.6 in pertinent part provides: "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury;

". . . . . .
. . . . . .

that he suffered no "actual damages" until the order denying him leave to amend the cross-complaint. The second is that he pled actual fraud in concealing the failure to file a governmental tort claim. We will discuss these claims seriatim; neither is persuasively supported and the contention of error is not meritorious.

II

Cullen claims that his cause of action is timely under section 340.6 because he suffered no "actual damages" until the order denying him leave to amend the cross-complaint. He asserts he "discover[ed] . . . the facts constituting the wrongful act or omission" of Counsel in the allegedly wrongful failure to prepare the case for trial in June 1987.

The question is when did Cullen "sustain actual injury" within the meaning of the

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(3) The attorney willfully conceals the facts constituting
the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-
year limitation;. . . "

statute. Defendants argue that Cullen sustained injury in 1987 when the adverse judgement was entered against Cullen Development Company, among other reasons, because "his interest in all partnership claims against the Housing Authority were [sic] lost and he had sustained injury at that time." The argument is persuasive.

The statutory provision that the limitations period is tolled during the time "the plaintiff has not sustained actual injury" is premised upon the view that the cause of action does not accrue until the alleged negligence results in some actionable harm to the plaintiff.

"If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm -- not yet realized -- does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice. Prosser states the proposition succinctly, 'It follows that the statute of limitations does not begin to run against a negligence action until some damage has

occurred.' [¶] The cause of action arises, however, before the client sustains all, or even the greater part, of the damages occasioned by his attorney's negligence. Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue." (Budd v. Nixen (1971) 6 Cal.3d 195, 200-201, citations and fn. omitted.)

Cullen submits that he suffered no appreciable harm by reason of the adverse judgement in 1987 because the action was stayed with respect to his liability and his cross-claim against the Housing Authority. Cullen's implicit claim is that the harm he suffered while wearing his partnership hat cannot be considered harm to him under his individual hat. This is not persuasive.

"The underlying fallacy in respondent's argument is the assumption that the partnership is a distinct unit, separate form the members thereof. Occasional suggestions of this 'entity' theory of partnership are found in statutes or decisions, but apart from exceptional situations, a partnership is not considered an entity, but an association of

individuals." (Reed v. Industrial Acc. Com. (1937) 10 Cal.2d 191, 192-193.) "A partner is a coowner with the other partners of specific partnership property holding as a tenant in partnership." (Corp. Code, § 15025, subd. (1).) As related, Cullen alleged in his first verified complaint that the partnership suffered the loss of a valuable property right, a chose in action, under the adverse judgment by reason of the alleged malpractice of Counsel. Cullen suffered appreciable harm in the loss or destruction of this partnership property of which he was a coowner.

As a partner Cullen could have commenced an action to recover for the alleged malpractice upon the entry of the adverse judgment on the partnership's cross-complaint. (See Laird v. Blacker (1992) 2 Cal.4th 606, 615; Corp. Code, § 15009; see generally Owens v. Palos Verdes Monaco (1983) 142 Cal.App.3d 855.) The policy of the statutes of limitation is one of repose, to preclude the assertion of stale claims. (See

3 Witkin, Cal. Procedure, supra, Actions, § 309.) In these circumstances, an exceptional recognition of a partnership "entity" theory would defeat this policy and is unwarranted.

Cullen also makes a protracted argument that is an attempted collateral attack in this court on the judgment in 1987 in an independent lawsuit. He argues that judgment should be found "not controlling in the case at bar" because in his view the trial court in that lawsuit erred in failing to stay the proceedings against his partners and Cullen Development Company as a result of his filing of a bankruptcy petition. He argues that the trial court in that lawsuit lacked jurisdiction to enter judgment against his codefendants because it had an adverse effect on his bankruptcy estate. He requests that we "vacate" the 1987 judgment in the Housing Authority action. He also argues that the degree of misconduct of Counsel was so egregious as to warrant equitable relief from the adverse 1987 judgment.

We imply no view on the potential merit of these arguments if raised in an appropriate forum. This is not such a forum. The 1987 judgment was obtained in an entirely different action than the one we review. It runs in favor of a different party. If the 1987 judgment can be "vacated" or otherwise overcome that must occur in an action to which the parties to that judgment are joined. If Cullen were to succeed in such an endeavor he could pursue his original remedy against the alleged underlying malefactor and has no claim against Counsel for depriving him of that remedy. If not, then it follows, as Cullen himself artlessly suggests, harm was done to him in the entry of the judgment in 1987 and at that point time under the one year period of limitations provided in section 340.6 pertaining to his cause of action against Counsel began to run.

III

Failing these claims Cullen argues that the statute of limitations was tolled until his

discovery that defendants fraudulently concealed their alleged negligence in failing to file a governmental tort claim which would have allowed them to plead a tort theory in the cross-complaint against the Housing Authority as an alternative to the contract theory which was plead. This, he argues, renders section 340.6 inapplicable.

This theory is based upon the view that, in addition to the cause of action for malpractice for abandonment of his defense to the Housing Authority action, Cullen stated a cause of action for fraud relating to his cross-complaint which could be maintained within three years of discovery under section 338, subdivision (d).[24] That discovery, so he alleges, occurred in August 1989 when he became aware of the concealment. The argument does not attend to

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[24] Section 338, subdivision (d), provides a three year period of limitation for "An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

the language of section 340.6, which distinguishes between "actual fraud", that is excepted from its ambit, and "wilfully conceal[ing] the facts constituting the wrongful act or omission when such facts are known to the attorney . . ."

Regardless of that distinction, Cullen's argument fails for the reason that the alleged fraud was not the legal cause of his injuries. "[T]he actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent." (Rest.2d Torts, § 432, subd. (1).) As discussed above, Cullen's interest were injured when the judgment was entered against Cullen Development Company in favor of the Housing Authority on its complaint and against the company on its cross-complaint. As explained, the statute of limitations started to run on regarding Cullen's malpractice claims predicated upon defendants' failures to defend against the Housing Authority

action. For the same reason the statute of limitations started to run against Cullen's malpractice claims regarding the cross-complaint.

Cullen seeks to prize off a tort theory of liability from the contract theory which was pled in the cross-complaint. He claims the tort theory could have been brought if a governmental tort claim had been filed against the public entity. As to this theory he claims the statute of limitations was tolled until discovery of the reason why the tort theory was not pursued. The viability of this theory is dependent upon its survivability as an independent cause of action. That is the defect in the argument.

Whether the cross-complaint sounded in tort or in contract or both, it advanced but one cause of action. Had the defendants done what Cullen says they should have done, i.e., timely filed a tort claim and amended the cross-complaint to advance this as an additional but alternative theory of recovery, the unfavorable

default judgment nonetheless would have been entered in the Housing Authority case and would have barred any subsequent action on the claim. The judgment entered in favor of the Housing Authority adjudicated the merits of Cullen's cross-complaint against the Housing Authority regardless of theory of recovery. (See generally, Perry v. Robertson (1988) 201 Cal.app.3d 333.) The cause of harm to Cullen thus occurred at the point of entry of the judgment on the cross-complaint. For the reasons already advanced, the statute of limitations then began to run on claims arising out of loss of that cause of action. The alleged failure to plead the tort theory and the "fraudulent" failure to disclose the reason did not cause Cullen any harm because it cannot be said that Cullen would have recovered "but for" these wrongs.

DISPOSITION

Cullen's motion for judicial notice on this appeal of certain materials in the record of his

appeal in the Housing Authority v. Cullen litigation is denied. The judgment (order of dismissal) is affirmed.

BLEASE, J.

We concur:

PUGLIA, P.J.

SCOTLAND, J.

APPENDIX D

MEMERING, VARANINI, HURST,
CROWLE & TRIMBLE
POST OFFICE BOX 590
SACRAMENTO, CALIFORNIA 95812-0590
TELEPHONE: (916) 923-2800

Attorneys for Defendants
Law Firm of Trainor, Robertson, Smits
& Wade and CHARLES TRAINOR, STUART SMITS,
WILLIAM DAVIS, DAVE ROBERTSON and
GARY FUNAMURA, individually

FILED: SEPTEMBER 27, 1991

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY
OF SACRAMENTO

CULLEN DEVELOPMENT COMPANY, et al.,

Plaintiffs,

vs.

TRAINOR, ROBERTSON, SMITS & WADE, et al.,

Defendants.
_____/

NO. 520230

ORDER AND JUDGMENT OF DISMISSAL RE: DEMURRER

DATE: SEPT. 24, 1991

TIME: 9:00 A.M.
DEPT: 28
THE HONORABLE JOE S. GRAY

The demurrer of defendants, LAW FIRM of TRAINOR, ROBERTSON, SMITS & WADE, and CHARLES TRAINOR, STURART SMITS, DAVE ROBERTSON, WILLIAM DAVIS AND GARY FUNAMURA, individually, to the

Further Amended First Amended Complaint of plaintiff, MARK T. CULLEN, came on regularly for hearing in this Court, Department 28 of Sacramento County Superior Court, before the Honorable Joe S. Gray on September 24, 1991. Plaintiff MARK T. CULLEN, represented himself and appeared on his own behalf. Defendants, Law Firm of TRAINOR, ROBERTSON, SMITS & WADE, and CHARLES TRAINOR, STUART SMITS, DAVE ROBERTSON, WILLIAM DAVIS and GARY FUNAMURS, individually, were represented by their counsel, HENRY W. CROWLE of MEMERING, VARANINNI, HURST, CROWLE & TRIMBLE.

On proof made to the satisfaction of the court that grounds for dismissal, with prejudice, and judgment thereon were proper as supported by defendants' demurrer, points and authorities, declarations, and other moving papers herein, and that defendants' demurrer be sustained without leave to amend,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that defendants' demurrer be, and the same

hereby is, sustained, without leave to amend on the basis that plaintiff's Further First Amended Complaint states no facts to constitute any cause of action whereby the action be dismissed, with prejudice, in its entirely, and that judgment of dismissal be awarded to defendants.

DATED: SEPTEMBER 27, 1991

JOE S. GRAY
JUDGE OF THE SUPERIOR COURT

APPENDIX E

MEMERING, VARANINI, HURST,
CROWLE & TRIMBLE
POST OFFICE BOX 590
SACRAMENTO, CALIFORNIA 95812-0590
TELEPHONE: (916) 923-2800

Attorneys for Defendants
Law Firm of Trainor, Robertson, Smits
& Wade and CHARLES TRAINOR, STUART SMITS,
WILLIAM DAVIS, DAVE ROBERTSON and
GARY FUNAMURA, individually

FILED: JULY 16, 1991

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY
OF SACRAMENTO

CULLEN DEVELOPMENT COMPANY, et al.,

Plaintiffs,

vs.

TRAINOR, ROBERTSON, SMITS & WADE, et al.,

Defendants.
_____/

NO. 520230

ORDER AFTER HEARING

DATE: JULY 11, 1991

TIME: 9:00 A.M.
DEPT: 28
THE HONORABLE JOE S. GRAY

The defendants' Demurrer in the above-entitled action came on regularly before this

court for hearing on July 11, 1991. Considering defendants' demurrer, plaintiffs' opposition, supporting points and authorities, the court files herein and on proof made to the satisfaction of the this Court,

IT IS HEREBY ORDERED THAT:

1. The Demurrer to Complaint of Cullen Development Company is sustained without leave to amend.

2. The Demurrer to the third cause of action for breach of contract is sustained with leave to amend for failure to state whether the alleged contract was written or oral.

3. The Demurrer to the first, second and fourth causes of action are sustained with leave to amend based on the statutes of limitations.

4. Plaintiff MARK T. CULLEN shall have 10 days after service of this order in compliance with Local Rules, Rule 32, to amend his complaint.

5. Defendants shall have 10 days from date of service of amended complaint to file a

responsive pleading.

DATED: JULY 16, 1991

JOE S. GRAY
JUDGE OF THE SUPERIOR COURT

APPENDIX F

Third Appellate District No. C011217
S030563

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

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HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, RESPONDENT

v.

FILED: FEB. 10, 1993
Robert Wandruff Clerk

MARK T. CULLEN, APPELLANT

==========

Appellant's petition for review DENIED.

LUCAS

Chief Justice

APPENDIX G

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

FILED: DECEMBER 15, 1992

HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, Plaintiff and Respondent, v. MARK T. CULLEN, Defendant and Appellant.	3 Civ.C011217 (Super.Ct.No. CV331596)

By the Court:

Appellant's petition for rehearing is denied.

Dated: December 15, 1992

SIMS, Acting P.J.

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APPENDIX H

NOT TO BE PUBLISHED

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(SACRAMENTO)

FILED: NOVEMBER 20, 1992

HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, Plaintiff and Respondent, v. MARK T. CULLEN, Defendant and Appellant.	3 Civ.C011217 (Super.Ct.No. CV331596)

INTRODUCTION

Although what is past is always prologue, in this appeal we must get a particularly long running start to comprehend the nature of the appellate contentions. Plaintiff Housing Authority of Sacramento County (SCHA) filed this action in 1985 for breach of contract against Mark T. Cullen.[25] The Cullens and the

[25] Also named defendants in the amended complaint were James and Richard Cullen and the business in which the three Cullens were partners, Cullen Development Company (hereafter, "the partnership"). Any subsequent undesignated "Mr. Cullen" references will be to Mark Cullen.

partnership filed a cross-complaint for breach of contract in February 1987. At the eventual start of trial in June 1987, Mr. Cullen produced a copy of a petition for voluntary bankruptcy (pursuant to title 11 of the United States Code) that he had just filed in federal court, which the trial court stated "preclude[d] any further proceedings against Defendant Mark Thomas Cullen." Ultimately, the court entered judgment against James and Richard Cullen and the partnership on both the complaint and cross-complaint in 1987.

Following Mr. Cullen's voluntary dismissal of his bankruptcy petition in December 1989, SCHA resumed proceedings against him. In August 1990, Mr. Cullen sought to amend his surviving portion of the cross-complaint (on which the trial court had taken no action) to add causes of action based on his successful defense of his contractor's license in a 1989-1990 disciplinary administrative proceeding instigated by SCHA. The trial court denied the motion without

comment. SCHA then moved for summary judgment on the cross-complaint on the ground of issue-preclusion, based on the fact it had prevailed on the cross-complaint against the other cross-claimants. The trial court granted the motion. Immediately prior to the February 1991 trial against Mr. Cullen, SCHA successfully moved in limine to exclude the introduction of any evidence in support of affirmative defenses which were related to the now-defunct cross-complaint. At the conclusion of trial, the court ruled in favor of SCHA but stayed entry of judgment pending additional argument on any issue-preclusive effect of the administrative proceeding. Ruling (after supplementary briefing) that there was no preclusive effect, the trial court entered judgment against Mr. Cullen in April 1991.

This brings us to Mr. Cullen's pro. per. appellate contentions. He asserts the 1987 judgments entered against the partnership and his partners are invalid because the Cullens

were abandoned by the attorneys representing them and because his bankruptcy stay should have been extended to his co-defendants. He also claims the trial court should never have allowed the attorneys to substitute out of the action, and should have allowed a continuance once they did. The short answer to this category of argument is that it comes too late in the day--the 1987 judgments against the partnership and the other Cullens, never having been appealed, are now final and may not be attacked here by Mr. Cullen either directly or collaterally. Mr. Cullen also challenges the denial of his motion to amend his cross-complaint, the grant of summary judgment on the cross-complaint, the preclusive effect on his affirmative defense accorded to the summary judgment ruling, and the failure to accord the administrative proceeding any preclusive effect in the present action. We shall affirm.

FACTS

To focus (at least initially) on the

transaction which is the subject of the original complaint and cross-complaint, SCHA and the Cullen partnership executed a written contract in August 1984 for construction of a 20-unit low/moderate-income housing project in Rio Linda at 6029 Dry Creek Road. The project was to begin in August 1984 and be substantially completed by March 1985. The partnership stopped work on the project in April 1985, having completed 46 percent of it, and ignored SCHA's demands to finish the job. SCHA took charge of the project and rebid it to another contractor. After deducting a number of credits, the cost to SCHA of completion was approximately $366,000.

In a curious maneuver, SCHA filed both a complaint and an amended complaint for breach of this contract on July 22, 1985. James, Richard, and Mark Cullen filed an unverified answer individually and as Cullen Development Company; they included the affirmative defense of a breach of contract on the part of SCHA, as well

as misrepresentation and fraud by SCHA in the inducement of the contract. For some reason, Tom Cullen also answered, although not named in the amended complaint.[26]

On February 5, 1987, the parties filed a stipulation for an order permitting defendants Cullen and the partnership to file a cross-complaint (despite the pending February 18 trial date) "containing a cause of action for Breach of Contract only." This pleading alleged that SCHA had frustrated the ability of the partnership to complete the project by altering terms and failing to pay for work completed in a timely fashion. On February 19, the case was reset for trial in June 1987 because there were no available courtrooms.

On June 3, 1987, James, Richard, and Mark

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[26] The original complaint included Tom Cullen as a defendant; the amended complaint deleted him. There is no explanation of the change. There were indications at the second trial in this matter that Tom Cullen was not a member of the partnership (although he is a brother of Mr. Cullen). As he is not a significant character in the lawsuits (other than as the executor of numerous proofs of service), we will not further concern ourselves with him.

Cullen filed a substitution of themselves in propria persona for their retained counsel (Trainor, Robertson & Smits); Mark Cullen signed a substitution on behalf of the partnership. Trainor, Robertson & Smits nonetheless appeared "specially" to argue for a continuance of trial, arguing they had substituted out because they had not been paid and their former clients would not be able to find alternative counsel in time for trial. Mark Cullen represented that he and his fellow litigants would be able to come up with the money for new counsel within the next 60 days. The court denied that motion.

On the morning of June 16, Richard Cullen failed to appear for trial and a default judgment was entered against him. Mark Cullen filed a peremptory challenge against the assigned judge, and the matter was reassigned to a different judge for trial that afternoon. When the matter was called for trial at 1:30 p.m., Mark Cullen presented the court with his bankruptcy petition, which had been filed 10

minutes earlier. He remained present at the hearing. After perfunctory questioning of James Cullen and a witness testifying to SCHA's damages, the court ruled against James Cullen and the partnership on SCHA's complaint and on the cross-complaint. No action was taken against Mark Cullen on the complaint or on the cross-complaint. The court initially entered judgment in favor of SCHA only on the complaint against Richard and James Cullen and the partnership; it later amended the judgment to include the cross-complaint. The judgment recited that the partnership had appeared "Pro per by JAMES CULLEN."

In April 1988, the Contractors' State License Board (CSLB) filed an accusation against Mark Cullen's contractor's license. This was based on consumer complaints filed by SCHA in June 1985 alleging the partnership had abandoned the Rio Linda Project and three other projects in April 1985 for which SCHA held contracts with the partnership. In a decision rendered May 22,

1990 (and adopted by the CSLB on June 25, 1990),[27] the administrative law judge found no basis for discipline for abandonment of these four projects because SCHA's conduct rendered performance by the partnership impracticable due to excessive and unreasonable expense and difficulty.[28] The CSLB did impose a 30-day suspension of the license for failure to account

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[27] Mr. Cullen had requested the trial court to take judicial notice of the complaint, accusation, and decision; SCHA raised no objection. We therefore take judicial notice of this decision as an official act of the executive branch. (Evid. Code, §452, subd. (c).) We may take judicial notice of the truth of its findings of fact. (Bach v. McNelis (1989) 207 Cal.App.3d 852, 865.)

[28] To quote a representative passage of the decision, "[SCHA]'s breaches of covenants and implied warranties, infra, coupled with selfish and incompetent project administration, constituted a material failure of consideration and rendered Cullen's continued performance on the Rio Linda project impracticable due to excessive and unreasonable difficulty and expense [SCHA]'s administrators significantly interfered with Cullen on the job site and with Cullen's relationships with its bonding companies and private line of credit, substantially hampering Cullen's ability to [perform successfully]. The totality of [SCHA]'s conduct toward Cullen operated to deny Cullen the benefit of its bargain made with [SCHA] in signing the contract. The material failure of consideration and the impracticability due to excessive and unreasonable difficulty and expense extinguished Cullen's obligation to further perform under the contract and provided Cullen the right to rescind."

properly for funds received on the Rio Linda project.

In September 1990, Mr. Cullen moved for leave to file an amended cross-complaint. According to his notice of motion, these new allegations "were discovered in a recent Administrative Law Case hearing the same legal issues," which was final as to the CSLB. He asserted any delay was reasonable because of his bankruptcy filing. He also claimed he had wished to await the resolution of the CSLB proceeding, since it presented the same factual and legal issues. The proposed cross-complaint now encompassed all four contracts with SCHA and contained causes of action for breach of contract and miscellaneous torts. SCHA opposed the amendment on several grounds: unreasonable delay and concomitant prejudice to SCHA; issue preclusion; failure to comply with procedural prerequisites for filing tort claims against governmental agencies; and the statute of limitations with respect to any new cross-

defendants brought into the action. SCHA's counsel also averred he had stipulated to permitting a cross-complaint to be filed on the eve of the 1987 trial only if it were limited to the single breach-of-contract cause of action. At the hearing on the motion, the court stated it felt the scope of the cross-complaint in 1987 was a tactical compromise by which Mr. Cullen should be bound.[29] The court was also disturbed by expanding the number of contracts at issue from one to four and adding tort claims (although Mr. Cullen expressed his willingness to abandon the tort claims). The court denied the motion "in its discretion."

Shortly after obtaining the order denying this motion to amend, SCHA filed a motion for summary judgment on the original cross-complaint. It argued the issue of whether it had breached the contract with Mr. Cullen

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[29] The trial court thus accepted the truth of SCHA's declaration on this point, which we may not gainsay. (Beckett v. Kaynar Mfg. Co., Inc. (1958) 49 Cal.2d 695, 699; Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal.App.3d 1058, 1077.)

had previously been adjudicated when the trial court had entered judgment against the other cross-complainants (i.e., the partnership and James and Richard Cullen) on the cross-complaint. The court granted the motion "for the reasons stated in the moving party's points and authorities."

In its final procedural salvo against Mr. Cullen, SCHA filed a motion in limine to exclude evidence of damages arising out of facts related to the dismissed cross-complaint. In arguing the motion, SCHA expanded the scope to any "legal excuse to not . . . perform on . . . the contract." The court at first denied the motion. After reexamining SCHA's authority, the court ruled that Mr. Cullen was precluded from introducing any evidence of the conduct on which the cross-complaint was based as an affirmative defense.

During trial, Mr. Cullen raised the CSLB proceedings as a defense, claiming SCHA was precluded from relitigating the question of his

breach of contract. The court told him he would have the opportunity to brief the issue before it rendered a written judgment. After receiving the parties' supplementary briefing, the trial court ruled it would not give an effect to the CSLB decision (giving five bases in its written order). This appeal followed.

DISCUSSION

I

Mr. Cullen's bankruptcy petition has no relevance to these proceedings

Woven throughout Mr. Cullen's brief on appeal are references to the effect of his bankruptcy filing on the validity of the 1987 judgments. We must first purge this spectre from the discussion.

It is true his interest in the partnership is considered part of his bankruptcy estate (In re Manning (10th Cir. 1987) 831 F.2d 205, 207) and therefore any proceeding by a creditor against that interest would be subject to the

automatic stay that is the "fundamental protection provided by the bankruptcy laws" (11 U.S.C. §362, subd. (a) (1); 1 Collier, Bankruptcy Manual (3d ed. 1992) §362.01, p. 362-3; §362.03[1], pp. 362-11 to 362-14).[30] Any action taken in violation of the automatic stay is void and without effect. (In re 48th Street Steakhouse, Inc. (2d Cir. 1987) 835 F.2d 427, 431.)

However, as noted above, SCHA never relied on the preclusive effect of the judgments against the other Cullens and the partnership in connection with its own complaint; rather, it relied on the judgments against the other cross-claimants on the cross-complaint. The automatic stay of the bankruptcy laws do not apply to actions brought by debtors. (1 Collier, op. cit. supra, §362.03, p. 362-15.) Even Mr.

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[30] Moreover, even if the partnership were somehow considered separate from Mr. Cullen's estate, the automatic stay could be applied to it if any judgment against it would in effect be a judgment against the debtor. (A. H. Robins Co., Inc. v. Piccinin (4th Cir. 1986) 788 F.2d 994, 999.)

Cullen admits in one part of his brief that the bankruptcy stay had no effect on the cross-complaint. The trial court refrained from any adjudication of his portion of the cross-complaint not because of the bankruptcy stay but because his cause of action vested in the bankruptcy trustee so Mr. Cullen could not continue to prosecute his action personally, absent an order of the bankruptcy court. (See Lauriton v. Carnation Co. (1989) 215 Cal.App.3d 161, 164-165.)[31] Thus, even assuming the judgment against the partnership on SCHA's complaint is void on its face and thus subject to collateral attack (8 Witkin, Cal. Procedure (3d ed. 1985) Attack on Judgment in Trail Court, §6, pp. 410-411; §12, pp. 414-415),[32] it is merely an academic question in the present

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[31] Presumably, the partnership was under no such disability in prosecuting the cross-complaint in its own name. However, the parties have not provided any argument or authority on the point, and we are not inclined to pursue it further.

[32] There is no suggestion by Mr. Cullen that the partnership is somehow directly attacking the prior judgment against it on the complaint. (8 Witkin, op. cit. supra, Judgment, §2, pp. 405-406 [listing various methods of direct attack].)

proceeding--the judgement on the complaint is not being used in any preclusive fashion against Mr. Cullen, and the judgment on the cross-complaint does not suffer a similar disability. We consequently will not consider the bankruptcy stay--or the prior judgment on the complaint--in any subsequent part of the discussion.

II

The trial court correctly disallowed the motion to amend the cross-complaint

The amendment of pleadings is governed by Code of Civil Procedure section 473, which provides in pertinent part, "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading . . . . " While there is a policy of liberality in permitting amendment, the question of whether a particular amendment should be allowed is within the discretion of the trial court. (Moss Estate Co. v. Adler (1953) 41 Cal.2d 581, 585-586 [no abuse in denying leave to amend answer

on eve of trial to assert new defense based on different facts].)

On appeal, the plaintiff attacks the trial court's reliance on the earlier stipulation filed by Trainor, Robertson & Smits that limited the cross-claim to one cause of action. He claims he should not be bound by the actions of counsel which he characterizes as "alleged negligence and malpractice."

All the facts underlying the new contractual causes of action in the proposed amendment to the cross-complaint were within the knowledge of Mr. Cullen and his attorneys at the time of the stipulated cross-complaint in February 1987 (as they related entirely to conduct on the part of SCHA prior to the partnership ceasing work on the four projects in April 1985).[33] In exchange for avoiding the risk of losing the motion for leave to amend on eve of trial (a denial more likely to occur and

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[33] We will take Mr. Cullen at his word that he was willing to waive all other causes of action, thus avoiding the need to address the additional objections by SCHA to them.

be upheld (e.g., Moss Estate Co., supra, 41 Cal.2d at pp. 585-586)), Mr. Cullen's counsel agreed to file a cross-claim limited to the one cause of action for breach of the Rio Linda contract. Mr. Cullen is consequently bound by that stipulation, and the trial court correctly refused to allow amendment in light of it.

It is true a party may seek relief from the effect of a stipulation pursuant to Code of Civil Procedure section 473. (In re Marriage of Carter (1971) 19 Cal.App.3d 479, 489.) However, even if we characterize Mr. Cullen's motion to amend his cross-complaint as incorporating a "pre-motion" to be relieved from the earlier stipulation on the basis of "unknowing[] depriv[ation] of effective representation" (Daley v. County of Butte (1964) 227 Cal.App.2d 380, 392),[34] and even assuming the conduct of Trainor, Robertson & Smits rose to a level

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[34] We have our doubts his papers would satisfy the formalities required for such a motion pursuant to the statute. (See 8 Witkin, op. cit. supra, Attack on Judgment in Trial Court, §167, p. 571.) We need not decide the question, however.

satisfying this standard,[35] the "pre-motion" is untimely under the six-month jurisdictional limitation of the statute. (8 Witkin, op. cit. supra, Attack on Judgment in Trial Court, §169, p. 573.)[36] If indeed Mr. Cullen was badly served by his former counsel making this stipulation, his remedy is not reversal of the trial court's decision denying his motion. (By the same measure, he may not challenge the trial court's failure to prevent Trainor, Robertson & Smits from "abandoning its clients" cross-complaint, its allowing the partnership to proceed in pro.per., or its failure to allow a continuance after counsel substituted out of the

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[35] In light of this assumption, we have not set out any of the facts on which Mr. Cullen bases his claim.

[36] Nor would it be of any succor to construe Mr. Cullen's motion to amend as incorporating a motion to invoke the court's inherent equitable power to relieve him of the effect of the stipulation (8 Witkin, op. cit. supra, §2(5), p. 406; §200, p. 598), assuming arguendo that a stipulation rather than a judgment can be the subject of such a motion. Being a narrower basis of relief than the statutory remedy, one cannot rely on counsel's inexcusable neglect. (Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal.3d 892, 901, fn.8.)

action, since the time for challenging any of these actions had long expired by the time of his motion to amend.)

III

The cause of action in the cross-complaint is precluded by the prior judgment

The doctrine of "res judicata" both bars a second suit between the same parties on the same cause of action ("claim preclusion," in the modern terminology) and estops a party against whom a judgment has been obtained from relitigating in a second proceeding any issues fully and fairly litigated in the first (denominated "issue preclusion"). (Knickerbocker v. City of Stockton (1988) 199 Cal.App.3d 235, 242; Rest.2d Judgments, Introduction to Chapter 1, p. 1.) The elements for application of issue preclusion are (1) whether the issue decided in the first proceeding is identical to the one raised in the second, (2) whether the first proceeding culminated in a final judgment on the merits,

and (3) whether the party against whom issue preclusion is raised was a party or in privity with a party against whom the issue was decided in the first proceeding. (Knickerbocker, supra, 199 Cal.App.3d at p. 244.)

To recapitulate, SCHA's motion for summary judgment on the cross-complaint was based solely on the ground of issue preclusion, SCHA asserting the 1987 judgment against the other cross-claimants on the cross-complaint resolved the issue of whether it had breached the contract on which Mr. Cullen's unamended cross-complaint was based. In essence, Mr. Cullen argues on appeal that application of issue preclusion here is a violation of his due process rights because of the lack of privity between himself and James Cullen, or between James Cullen and the partnership.[37] Be this as it may, it is entirely beside the point.

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[37] He adverts in passing to the absence of a final judgment on the merits, but as he advances neither argument nor authority on this point, it is deemed waived. (People v. Hardy (1992) 2 Cal.4th 86, 150-151.)

As he admits here, and admitted in the trial court, he was the "managing general partner" of the partnership, was "in complete control of all partnership assets, including the instant litigation" (on the cross-complaint), and had full authority for management of the partnership affairs (his fellow partners Richard and James averring they simply supervised the actual construction work). As such, it was his decision (whether voluntarily or as a victim of circumstance) to restrict himself to merely sitting in court and failing to present any affirmative case of the partnership's cross-complaint, allowing judgment to be entered against it, and failing to appeal the adverse decision. As the person controlling the partnership with financial interest in the partnership, the issue-preclusive consequences of the <u>failure</u> to present any case on behalf of the partnership--which is no less "conduct of the action" than affirmatively presenting a case--may permissibly be applied against Mr.

Cullen, since he was in privity with the partnership. "'A person who is not a party to an action but who controls the action is bound by the judgment where he has a proprietary or financial interest in the judgment or in the determination of question of fact or law with reference to the same subject matter or transaction.'" (7 Witkin, Cal. Procedure (1985) Judgment, §295, p. 733; accord Stafford v. Russell (1953) 117 Cal.App.2d 319, 320 [principal stockholder of previously unsuccessful plaintiff corporation bound by judgment against corporation because he had controlled conduct of earlier litigation].)[38] Therefore, there was no obstacle to granting

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[38] Mr. Cullen argued in the trial court that he was denied a full and fair opportunity to litigate the issue of SCHA's breach of contract in the prior action. He does not specifically renew this as a ground for reversal of the trial court's ruling. However, as with his attempt to avoid the effect of the stipulation on his attempt to amend his cross-complaint, any direct attack upon the prior judgment against the partnership on the cross-complaint by means of a motion under Code of Civil Procedure section 473 is untimely, and counsel's alleged inexcusable behavior cannot be a basis for relief under the trial court's inherent equitable powers.

summary judgment on the cross-complaint on the basis of issue preclusion.

IV

The trail court properly granted the motion excluding all evidence tied to the cross-complaint

In granting the motion in limine brought by SCHA, the trial court expressly relied on Torrey Pines Bank v. Superior Court (1989) 216 Cal.App.3d 813. In an extremely abbreviated argument, Mr. Cullen argues against application of this decision on two bases. First, he claims the bankruptcy stay distinguishes the present situation from Torrey Pines. Second, he claims the trial court expressly stated the 1987 judgment "would have no effect on [him]."

In Torrey Pines, the petitioner bank filed an action against a guarantor of a debtor business which had defaulted. The debtor then filed an action against the bank for breaches of fiduciary duty and the covenant of good faith and fair dealing, for negligent

misrepresentation, and for negligence. The guarantor subsequently filed an amended complaint in the debtor's action naming himself as a plaintiff both individually and as the debtor's guarantor. Ultimately, the guarantor filed a dismissal with prejudice of his action. (216 Cal.App.3d at pp. 816-817.) In granting a writ directing entry of summary judgment against the guarantor, the Torrey Pines court held the guarantor's affirmative defenses were barred by the issue-preclusive effect of the dismissal with prejudice (termed a "retraxit") of his own action against the bank, since they were based on the same facts. (Id. at pp. 819-822.) The court relied on Hamilton v. Carpenter (1940) 15 Cal.2d 130, 132-133, in which the Supreme Court had held that the defendants were properly prevented from introducing evidence of fraud as a defense where they had previously brought an action for the identical fraud and had not prevailed.

Given the myriad of ways in which issue

preclusion may occur, the Torrey Pines decision is sufficiently analogous to be controlling here. The gist of Mr. Cullen's cross-complaint was the behavior of SCHA in insisting on performance that varied so substantially from the terms of the written agreement that it constituted a breach. The affirmative defenses to the complaint--breach of contract, misrepresentation, and fraud--depend on the same facts. It is of no import that Torrey Pines involved a separate action rather than a dismissed cross-complaint. It is also of no import that Mr. Cullen (and possibly the partnership) had the benefit of an automatic stay because of his bankruptcy petition; at the risk of endless iterations, it is the issue-preclusive effect of the judgment against the partnership on the cross-complaint--which was not subject to the stay--which bars the introduction of this evidence. Finally, to the extent Mr. Cullen could rely on the trial court's pronouncements at the 1987 "trial," the

quotations to which he refers are directed only to the question of the effect of the 1987 proceedings on the action against him; there is no "promise" that there will be no effect on his cross-complaint. Thus, the trial court properly excluded evidence relating to the cross-complaint.

V

No preclusion results from the CSLB's resolution

Finally, Mr. Cullen challenges the various bases for the trial court's failure to accord any preclusive effect to the CSLB's determination. Since it is sufficient to rely on any one of the trial court's rationales in affirming its ruling, we limit our discussion to the simplest--i.e., the different burden of proof in the two proceedings.[39]

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[39] To recount this portion of the court's ruling, "The standards of proof in the two actions were distinct. Complainant's failure of proof by clear and convincing evidence of a breach of contract in the administrative hearing does not preclude proof of such by a preponderance of the evidence in the instant case."

Although Mr. Cullen devotes a portion of his argument to the proposition, it is not disputed by SCHA that "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court." (Rest.2d Judgments, §83, subd. (1) [emphasis added]; accord County of Los Angeles v. Department of Industrial Relations (1989) 214 Cal.App.3d 1538, 1544.)[40] We have already set out the necessary elements for invocation of issue preclusion, which we will assume arguendo are satisfied here (including privity).[41] However, even where these elements are satisfied, "relitigation of the issue in a

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[40] Therefore, we will eschew any explanation of the requisites and limitations connected with according issue-preclusive effect to an administrative determination. (See Rest.2d Judgments, Introduction to Chapter 6; §83, subds. (2) - (4).)

[41] We note, however, that the presence of privity between the CSLB and the SCHA (which was not a party to the CSLB proceedings and had no control over the litigation) is problematic. (See Rest.2d Judgments, §36, comment f [discussing intragovernmental privity].)

subsequent action . . . is not precluded . . . (4) [where t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action . . ." (Rest.2d Judgments, §28.) As the Restatement explains, "To apply issue preclusion in the cases described in Subsection (4) would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden been imposed . . . This is a major reason for the general rule that, even when the parties are the same, an acquittal in a criminal proceeding is not conclusive in a subsequent civil action arising out of the same event." (Id., comment f.)

We have held in past that failure to establish guilt beyond a reasonable doubt in a criminal proceeding has no preclusive effect in a subsequent probation-revocation proceeding between the same parties where an issue need only be established by preponderance of the

evidence. (In re Anderson (1951) 107 Cal.App.2d 670, 672 [cited with approval in Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal.2d 601, 605].) By a parity of reasoning, that an issue has been established by only a mere preponderance in a dependency proceeding is not determinative in a subsequent proceeding between the same parties to terminate parental rights, where the issue must be established by clear and convincing evidence. (In re Nathaniel P. (1989) 211 Cal.App.3d 660, 670-672.)[42]

The burden of proof in an administrative hearing involving the discipline of licensees is clear and convincing evidence. (Realty Projects, Inc. v. Smith (1973) 32 Cal.App.3d 204, 212; Evid. Code, §115.) In the absence of any affirmative showing to the contrary, we presume this is the standard applied in the administrative proceedings under review, even if

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[42] On the other hand, a party's failure to establish a fact even by a mere preponderance is preclusive in a subsequent proceeding with a higher burden of proof. (People v. Sims (1982) 32 Cal.3d 468, 485.)

not specifically recited in the decision. (Feist v. Rowe (1970) 3 Cal.App.3d 404, 422; Evid. Code, §664.) On the other hand, the burden of proof in the present proceedings under review is merely preponderance of the evidence. (Evid. Code, §115.) Although there is no precedent specifically involving the present circumstances, the principle of the Anderson and Nathaniel P. cases mandates that even if the SCHA can be considered to be in privity with the CSLB, the CSLB's failure to establish a breach of contract in a proceeding where it had a burden of clear and convincing evidence has no effect in a subsequent proceeding where SCHA need only prove the breach by a preponderance. Consequently, the court correctly refused to accord the CSLB decision any preclusive effect in the present action.

VI

Mr. Cullen claims the totality of the trial court's action resulted in the denial of his due process rights. Indeed, in light of the

findings of the CSLB's administrative law judge, this is not a case where the result bespeaks "justice" in an abstract sense since SCHA is being permitted to recover for a breach occasioned by its own obstructionist bureaucratic conduct. However, SCHA has been placed in the catbird seat not by the actions of the trial court but by the de facto default of the Cullens and the partnership in 1987 (Mr. Cullen's bankruptcy merely forestalling the inevitable with respect to him).

DISPOSITION

The judgment is affirmed. Neither party shall recover costs.

DAVIS, J.

We concur:

SIMS, Acting P.J.

SCOTLAND, J.

APPENDIX I

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO
FILED: APRIL 4, 1991

HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, a public body corporate and politic, Plaintiff,	NO. 331596 Dept. 6
vs.	ORDER AFTER HEARING RE COLLATERAL ESTOPPEL
MARK T. CULLEN, doing business as CULLEN DEVELOPMENT COMPANY and DOES 1 to 10, Defendants.	

By post-trial briefing with points and authorities argued by both plaintiff and defendant, Mark T. Cullen, defendant argues that principals of collateral estoppel should preclude plaintiff from re-litigating the issue of defendant's breach of contract.

The relevant facts on this issue are as follows:

1. Plaintiff obtained a verdict after trial by the court against all defendants with

the exception of Mark T. Cullen on its breach of contract complaint of June 16, 1987. The complaint as to Mark T. Cullen was stayed by virtue of that defendant's bankruptcy action filed in federal court.

2. Mark T. Cullen obtained a favorable result at an administrative hearing brought against him by the Contractors' State License Board wherein he was found by the administrative law judge not to have breached this contract with this plaintiff. Said decision was rendered on June 25, 1990, to become effective on July 25, 1990.

3. Trial in the instant matter was held on February 11 and 13, 1991, wherein this Court ruled in plaintiff's favor on the motion in limine precluding defendant from asserting any affirmative defense under the doctrine of collateral estoppel by virtue of the privity of this defendant with the other defendants in the verdict entered on June 16, 1987.

4. This Court rendered a verdict in favor

of plaintiff and against this defendant on the breach of contract complaint as stated on the record and stayed judgment pending briefing and decision on defendant's collateral estoppel arguments.

The Court finds for plaintiff and against defendant on defendant's collateral estoppel claims as stated hereinafter.

1. While the issues in the administrative hearing and present trial were sufficiently similar (breach of contract and legal excuse therefore), the remedies were sufficiently dissimilar (suspension or revocation of contractors' license and money damages for breach of contract) to preclude a finding of privity between this plaintiff and the complainant, Contractors' State License Board.

2. The plaintiff herein and the complainant in the administrative action had sufficiently diverse interests to militate against a finding of privity between them.

3. The standards of proof in the two actions were distinct. Complainant's failure of proof by clear and convincing evidence of a breach of contract in the administrative hearing does not preclude proof of such by a preponderance of the evidence in the instant case.

4. Defendant herein has additionally failed to allege and prove the finality of the administrative decision.

5. This Court will not give collateral estoppel effect to an administrative determination that was rendered subsequent in time to the prior determination in this same case in which this Court had previously determined that principles of collateral estoppel operate against this defendant.

The verdict rendered herein is confirmed and the stay is lifted. Plaintiff is directed to prepare the judgment.

DATED: April 4, 1991

JAMES I. MORRIS
JUDGE OF THE SUPERIOR COURT

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OF THE COUNTY OF SACRAMENTO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

-oOo- **FILED: APRIL 4, 1991**

HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, Plaintiff, v. JAMES CULLEN, et al., Defendants.	NO. 331596 JUDGMENT AS TO DEFENDANT MARK T. MARK T. CULLEN

This cause came on regularly for trial on February 11, 1991 in Department 6 of the above entitled court, Honorable James I. Morris presiding, sitting without jury, a jury having been duly waived. Plaintiff HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO appeared by Alan C. Campbell, its attorney, and Defendant MARK T.

CULLEN appeared in pro per. Evidence, both oral and documentary, having been presented by the parties, the cause having been argued and submitted for decision,

IT IS ADJUDGED, ORDERED, AND DECREED that judgment be, and hereby is, entered in favor of Plaintiff HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO and against Defendant MARK T. CULLEN in the amount of Three Hundred Sixty-Two Thousand Six Hundred One Dollars ($362,601), and that Defendant MARK T. CULLEN takes nothing by his cross-complaint. Plaintiff to recover costs. $1,545.43

Dated: April 4, 1991

JAMES I. MORRIS
Judge of the Superior Court

APPENDIX J

BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTORS STATE LICENSE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

FILED: JUNE 25, 1990

In the Matter of the Accusation Against:	NORTHERN REGION CASE NO. N-87-513
CULLEN DEVELOPMENT COMPANY P.O. Box 1215 Shingle Springs, CA 95682 License No. 448299, B Mark T. Cullen, QP Richard N. Cullen, PT James P. Cullen, PT Respondent	OAH NO. N-31620

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Registrar of Contractors as his Decision in the above-entitled matter.

IT IS FURTHER ORDERED that respondent, CULLEN DEVELOPMENT COMPANY, License No. 448299, on or after August 24, 1990 shall file a bond or post a cash deposit in the amount of $15,000.00

pursuant to and in accordance with the provisions of Section 7071.8 of the Business and Professions Code, and that respondent is hereby notified that practice under the license herein concerned may not be restored until satisfactory evidence of such bond or cash deposit is on file with the Registrar of Contractors.

This Decision shall become effective on the 25th day of July, 1990.

IT IS SO ORDERED June 25, 1990.

DAVID R. PHILLIPS
REGISTRAR OF CONTRACTORS

BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTORS STATE LICENSE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	NORTHERN REGION CASE NO. N-87-513
CULLEN DEVELOPMENT COMPANY P.O. Box 1215 Shingle Springs, CA 95682 License No. 448299, B Mark T. Cullen, QP Richard N. Cullen, PT James P. Cullen, PT Respondent	OAH NO. N-31620

PROPOSED DECISION

Between June 13, 1989 and December 22, 1989, on eighteen days which are of record, in Sacramento, California, Stephen J. Smith, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

June LaVerne Long, Deputy Attorney General, represented complainant.

Mark T. Cullen qualifying partner, Cullen Development Company, appeared in person and

represented himself and Cullen Development Company. James P. Cullen and Richard N. Cullen did not appear.

Evidence was received and the record remained open for the receipt of closing written argument and briefs. Complainant's opening brief and argument was received on February 7, 1990. Respondent's closing brief and argument was received on February 26, 1990. Complainant's reply brief was received on March 14, 1990. The record was closed and the matter was submitted.

FINDINGS OF FACT

I

JURISDICTION AND PRELIMINARY MATTERS

A.T. Lennan, Assistant Regional Deputy, Contractors' State License Board ("the Board"), State of California, made charges and allegations contained in the Accusation in his official capacity pursuant to the authority of Business and Professions Code sections 7090 and 7106.5.

II

LICENSE HISTORY

On November 3, 1983, the Board issued contractor's license number 448299, classification B, general building contractor, to Cullen Development Company ("Cullen"), a general partnership. The partnership listed Mark Cullen as qualifying partner, James Cullen and Richard Cullen as partners. On September 21, 1985, the license was suspended pursuant to the mandate of Code of Civil Procedure section 996.340, for failure to post an adequate contractor's bond. The license expired still suspended on November 30, 1985.

III

CONTRACTS WITH SACRAMENTO HOUSING AND REDEVELOPMENT AGENCY

On December 18, 1984, Cullen Development Company entered into a contract in writing with the Sacramento Housing and Redevelopment Agency ("SHRA") to construct a 20 unit low income housing apartment complex with a separate

laundry building at 6601 Pomegranate Avenue in South Sacramento, California ("the Pomegranate project"). The project was to be constructed for the sum of $684,968.00. Work commenced on the South Sacramento project on March 6, 1984. Work stopped on April 22, 1985 when Cullen filed a Stop Notice pursuant to Civil Code section 3103. At that time, Cullen had been paid the sum of $677,137.00 by SHRA. The work was substantially complete and the apartments were occupied by residents when the Stop Notice was filed, but exterior and interior punch lists were not completed.

On July 23, 1984, Cullen entered into a contract in writing with SHRA for the construction of a 20 unit low income housing apartment complex at 5519 Date Avenue, North Highlands, California ("the Date Avenue project"). The project was to be constructed for the sum of $496,600.00. Work commenced on July 26, 1984, and ceased on April 22, 1985 with the filing by Cullen of a Stop Notice pursuant

to Civil Code section 3103. At that time, Cullen had been paid the sum of $404,664.00 by SHRA.

On August 16, 1984, Cullen entered into a contract in writing with SHRA for the construction of a 20 unit low income housing apartment complex with a separate laundry room at 3025-3031 Dry Creek Road, Rio Linda, California ("the Rio Linda project"). The project was to be constructed for the sum of $744,900. Work commenced on August 20, 1984, and ceased on April 22, 1985 with the filing by Cullen of a Stop Notice pursuant to Civil Code section 3103. At that time, Cullen had been paid the sum of $309.002.00

On December 18, 1984, Cullen contracted in writing with SHRA for the construction of a 16 unit low income housing apartment complex located at 9205 Elk Grove Boulevard, Elk Grove, California ("the Elk Grove project"). The project was to be constructed for a total cost of $649,990.00 Work commenced on a date not

established and ceased on April 22, 1985 with the filing of a Stop Notice by Cullen pursuant to Civil Code section 3103. At the time work was stopped, Cullen had been paid the sum of $19,575.00 by SHRA.

Each of the four above-referenced construction contracts were entirely federally funded by the U.S. Department of Housing and Urban Development ("HUD"). SHRA was the local administrator of the projects, oversaw the construction in accordance with federal guidelines, and disbursed the construction funds obtained from HUD. Every aspect of the projects required advance HUD approval. SHRA had no local budget or funds of its own to assist in the construction of the projects. Each of the four contracts incorporated by reference the general conditions, which were HUD standard form and identical for each contract, special conditions and the architectural drawings. The special conditions and drawings were unique to each contract. Administration of the contracts

by SHRA was to be governed by the uniform HUD general conditions.

IV

ABANDONMENT

It was not contested that Cullen abandoned the Rio Linda construction project with the work 46% completed. The list of work set forth at Paragraph 5 of the Accusation was not completed by Cullen at the time the Stop Notices were filed. At the time Cullen filed the Stop Notices, SHRA had paid Cullen $309,002.00. This sum was 41% of the contract price, unadjusted for extra work required as the work progressed.

Cullen's abandonment of the Rio Linda project work was with legal excuse. SHRA's breaches of covenants and implied warranties, infra, coupled with selfish and incompetent project administration, constituted a material failure of consideration and rendered Cullen's continued performance on the Rio Linda project impracticable due to excessive and unreasonable difficulty and expense. SHRA's administrators

significantly interfered with Cullen on the job site and with Cullen's relationships with its bonding companies and private line of credit, substantially hampering Cullen's ability to successfully perform. The totality of SHRA's conduct toward Cullen operated to deny Cullen the benefit of its bargain made with SHRA in signing the contract. The material failure of consideration and the impracticability due to excessive and unreasonable difficulty and expense extinguished Cullen's obligation to further perform under the contract and provided Cullen the right to rescind. Cullen exercised that right by filing the Stop Notice.

At the time Cullen filed the Stop Notice, it was bankrupt as an entity and its principals were personally bankrupt as well. Although bankruptcy was not necessarily a prerequisite to proof of impracticability of further performance, it was demonstrative of the effects of the material failure of consideration and the excessive and unreasonable difficulty and

expense Cullen encountered. The bankruptcy was in stark contrast to Cullen's stated net worth of $2.7 million at the commencement of work with SHRA 21 months earlier, and included the evaporation of a $1 million line of credit Cullen obtained to assist in performing under the contracts with SHRA. SHRA's architect acknowledged that Cullen bid the Rio Linda project competently and actually in excess of the architect's own estimate of the cost of construction.

V

BREACH OF IMPLIED COVENANTS

The HUD General Conditions, incorporated in the Rio Linda contract, are generally silent regarding the express duties of the Local Housing Authority (SHRA) with respect to the administration of the contracts. However, implied covenants exist in fact and in law that govern SHRA's conduct in its administrative duties. These implied covenants are that SHRA must reasonably and expeditiously process

requests by the contractor for change orders, compensation for extra work and time delays, that SHRA could and would competently and fairly administer the contract, that SHRA would refrain from conduct that could or would deny Cullen the benefit of its bargain or impair Cullen's ability to perform, and that SHRA would conduct itself in accordance with the implied-in-law covenant of good faith and fair dealing. SHRA breached each of these implied covenants in the Rio Linda project contract.

1. IMPLIED COVENANT TO PROCESS CHANGE ORDERS EXPEDITIOUSLY

SHRA's representatives acknowledged that it "held" requests for change orders by the contractor that it considered "too small" to process immediately. These small requests for changes, typically $2,000.00 or less, were accumulated until "enough" such requests had been accumulated to justify the SHRA administrative time required to process them. It was well known that processing was very slow

without such additional delay because HUD was slow to approve such requests. It was known to SHRA that such delays were costly to the contractor in that delays in obtaining authorization for changes delayed the work, denied the contractor prompt compensation for extra work, and frequently required the contractor to reorganize the work. SHRA also knew that it was obligated under the Rio Linda contract to expeditiously process each request for change order received from the contractor, regardless of amount. SHRA representatives acknowledged at the hearing that, despite awareness of this obligation, it refused to promptly process small change order requests until SHRA decided it was administratively reasonable for it to do so.

SHRA breached the implied covenant to process change order requests expeditiously and fairly for Cullen on the Rio Linda project. Although Cullen submitted at least three such requests, one "small" but two of which requested

authorization, compensation and delay time for significant changes to the contract work, SHRA fully processed none of these requests. Only one of these requests made by Cullen was submitted to HUD for approval, and then, only in response to threats from Cullen's attorneys. This request was never approved by HUD or returned to SHRA, and had been delayed for months by SHRA's neglect before the receipt of the threat from Cullen's attorneys. Cullen received no expeditious review of change order requests and no support in making such requests, despite SHRA's knowledge that such delays were difficult and costly for the contractor. SHRA conducted itself unreasonably in stalling or refusing to process Cullen's change order requests.

A course of SHRA conduct in disregarding its obligation to reasonably and expeditiously process change orders submitted by Cullen was already fully developed by the time Cullen submitted his first request for changes on the

Rio Linda project. By the time the Rio Linda project had developed significant construction activity, the Pomegranate project had been under construction for nine months and the Date Avenue project for more than three months. Cullen constructed each of the three projects with staggered starts so that the same subcontractors and office support staff could be used. At the time Cullen submitted its first request for a change order on the Rio Linda project, Cullen had experienced a continuing pattern of frustration and refusal to process its requests for changes on the Pomegranate and Date projects. This pattern had led to a deterioration in the relationship between Cullen and SHRA as Cullen became increasingly vocal in it insistence that SHRA abide by its contract obligations to fairly and expeditiously process its requests. The failure of SHRA to meet these obligations had become very costly to Cullen, and the cumulative effect of SHRA's conduct on the Pomegranate and Date projects became a

significant impairment to Cullen's ability to perform on the Rio Linda project.

For example, Cullen filed five requests for change orders on the Pomegranate project, covering fifteen different changes resulting in additional costs of over $5,000.00, not including administrative time required to file and document the submissions. Two of the five were processed, but resulted, after lengthy delays, in reductions of the amounts due Cullen under the contract of over $2,000.00. The other three were neither fully processed or paid, even though one had been pending for approximately eight months by the time the Stop Notice was filed. On the Date Avenue project, Cullen filed at least one request for a change, for the installation of back water valves, at a cost of approximately $13,000.00. No change order request was fully processed and paid by SHRA on the Date Avenue project before the Stop Notice was filed. Cullen proved that there were a significant number of costly and delay-producing

changes requiring extra work on both projects. Delay in processing the change order requests did not relieve Cullen of the cost and necessity of proceeding with the work, even where the work contractually could not proceed without the change order. Cullen was required by SHRA's conduct to absorb the costs of the changes, all of which were the result of errors and omissions on the construction drawings or the encounter of unanticipated problems at the job sites. By the time the first request for change was submitted on the Rio Linda project, Cullen had already absorbed nearly $20,000.00 in additional costs required by changes to the work of the first two projects, non of which were Cullen's fault.

Although there were numerous errors and omissions on the construction drawings for the Rio Linda project, necessitating significant extra work, no request for a change order submitted by Cullen was ever fully processed and paid by SHRA. Cullen had little choice but to continue construction without approval of the

change orders, facing SHRA threats of the assessment of liquidated damages and breaches of covenants to keep the work progressing and to deliver a completed project on time. In January, 1985, the relationship had deteriorated so significantly that SHRA acknowledged it had withdrawn all cooperation from Cullen, refusing to "hand-hold an inexperienced contractor", and alleging Cullen was not a "team player" for its insistence that SHRA abide by its contractual obligations and compensate it for significant extra work. SHRA's expressed attitude toward Cullen was that two could "play hardball". Cullen's task to obtain change order approval for extra work and compensation was unreasonably difficult before January, 1985. It was impossible after that time.

The general specifications of the contract recognize only two means of authorization for extra work, a change order in advance of work, or a notice to proceed with a stipulated maximum compensation for the work. Both the advance

change and notice to proceed must be in writing to be enforceable by the contractor. Oral promises to pay for changes or extra work were not enforceable, a fact Cullen knew from the outset. SHRA knew that the process for obtaining a change order in advance of the work was very time consuming and thus impractical on time sensitive work such as the Rio Linda project. The process for obtaining a notice to proceed was more expeditious, but unless the notice specified a promise to pay for extra work up to a stated maximum, it was unenforceable. SHRA had abandoned the use of notices to proceed to deal with extra work and changes by the time the Rio Linda project commenced. The general specifications required the contractor to furnish a complete work within a specified number of consecutive days, or suffer the assessment of significant liquidated damages. The general conditions contained a covenant requiring the contractor to exercise all necessary efforts to keep the work progressing

and making progress toward completion.

SHRA used the change order request process, the covenant requiring the contractor to continue to make progress on the work, and the threat of the assessment of liquidated damages to shift the burden of the costs of errors and omissions in the construction drawings and the cost of extra work necessitated by unforeseen problems on the job site to Cullen. Cullen was unaware that SHRA had no additional funds available to pay for costs over and above the contract price, or to pay for changes or extra work. In order to obtain such funds, SHRA would have to make an embarrassing plea to HUD or local funding agencies, all of whom looked upon such costs overrun requests disdainfully and indicative of SHRA's lack of administrative competence. SHRA used the contract provisions to shift the cost burden of these changes and extras to the contractor, thus avoiding the need to obtain additional funds from HUD or local agencies.

Early on n the Pomegranate project, each time Cullen identified an error, omission or problem that required extra work, the SHRA field administrator would aggressively challenge the need and request Cullen continue with the work in order to avoid the need for a change order. Frequently, in response to such aggressive challenges, the cost of small items of extra work would be absorbed by Cullen and disappear into the contractor's overhead and profit in the interest of being a "team player". If it became apparent the item was larger and required a formal change, SHRA had Cullen prepare the submission and then diligently searched for an offsetting reduction at some other place in the work. In this matter, Cullen's first two requests for changes, requesting additional compensation for extra work in the amount of nearly $5,000.00, became a deficit of nearly $2,000.00. However, the work Cullen was required to do did not necessarily decrease with the reduction. For example, after trenching for

the water line and delivering materials on site, Cullen was precluded by the utility from making the water main connection, which had to be made by a contractor chosen by the utility. SHRA not only reduced Cullen's compensation by the amount of the tie-in, billed to them by the utility, but denied Cullen compensation for the work done up to the tie-in, including the trenching.

SHRA unreasonably delayed or refused to process completely all requests submitted by Cullen for extra compensation or delays on all projects submitted after these first two requests. All of these submittals were the result of Cullen being required to perform extra work on the projects due to errors and omissions on the drawings and unanticipated construction problems. Although Cullen's work was not error-free, as evidenced by the reversal of the plumbing in the slabs at Pomegranate, Cullen readily offered to correct errors of its own doing at its own cost. There was no evidence that extra costs associated with correction of

errors caused by Cullen itself materially contributed to Cullen's inability to go forward with the work later. The plumbing reversals were corrected at a minimum additional cost by reversing the structures to match.

SHRA typically blamed HUD for the extraordinary delays in processing of Cullen's submissions for extra work change orders, compensation for extra work and time extensions. SHRA also faulted Cullen for failure to timely for submit change orders and failure to properly document the submittals it did make. Thus, SHRA contends that Cullen's failure to receive compensation for the extra work necessitated on the projects was in part or wholly its own fault. All of these contentions are rejected as wholly without credibility. Any failures on Cullen's part to submit requests for changes were the result of Cullen's reasonable belief that SHRA would not process or pay them. SHRA used changing standards for documentation to stymie Cullen's ability to submit requests for

changes and shift blame for its own delays.

The processing delays blamed upon HUD were sometimes HUD's fault, but many of the requests submitted in evidence never were submitted to HUD by SHRA, or contained unilateral reductions disadvantageous to Cullen made after Cullen had submitted them. The submittals that actually arrived at HUD for processing were never pursued by SHRA on behalf of Cullen. SHRA was content to allow the submittals to remain at HUD indefinitely without following up to assist in expediting the process. The delayed processing of Cullen's submittals for change orders requesting authorization for time extensions and compensation for extra work were to SHRA's advantage. As evidenced by the experience of IBA Construction, the contractor that completed the Rio Linda project, delayed processing of such changes gave SHRA an opportunity to negotiate away some or all of the compensation due the contractor for extra work at the close out of the project, in exchange for a waiver of

the threat of assessing liquidated damages against the contractor's retention. By employing this negotiating technique combined with its own delays in processing requests for compensation for extra work, SHRA attempted to transfer some of the costs of the extra work to the contractor. SHRA was well aware that the contractor was anxious to obtain the retention and avoid the threat of the assessment of liquidated damages. Very few SHRA projects were completed within the contract's time limits, which made the issue of liquidated damages for failure to timely complete the work always an issue. The contractor was at a serious disadvantage in such negotiations.

By January, 1985, Cullen became aware that it was being seriously hampered in it performance by SHRA's failure to compensate Cullen for any extra work performed on any of the three projects. Rather than the advance change order or notice to proceed procedure, the SHRA administrator on the Rio Linda project used

a "field change" procedure for extra work or changes. This procedure consisted of the SHRA administrator's promise to pay Cullen for the extra work if Cullen would keep the work proceeding. If Cullen balked at this obviously unenforceable promise, the SHRA administrator reminded Cullen that it was not conducting itself as a "team player", that Cullen was obligated to continue progress toward a whole and complete project, and that if Cullen delayed the work to wait for written change order or notice to proceed, Cullen would most certainly by assessed liquidated damages when the contract period expired. Faced with such an impossible dilemma, both SHRA and Cullen knew that continuing with construction upon the oral and unenforceable promise to pay was Cullen's only option. SHRA later reneged upon all such oral promises to pay for the extra work, and held the remainder of the incompletely processed change orders to offset their own anticipated costs when Cullen filed the Stop Notices. Cullen

received no additional compensation for significant extra work on the Rio Linda project, even though none of the problems necessitating the extra work were Cullen's fault.

2. IMPLIED COVENANT NOT TO HAMPER CULLEN'S ABILITY TO PERFORM

SHRA's architect acknowledged SHRA was very difficult to work for, characterizing a working relationship with SHRA as "chaotic". According to the architect, SHRA projects were unusually difficult for the contractor, more so than the extra degree of difficulty to be expected in public contracting. The Rio Linda project required an "unusual" number of changes and SHRA made obtaining authorization for compensation for extra work required by those changes very difficult to impossible. SHRA demanded work continue on jobs without a written change order, then reneged upon promises to pay for the work that were made to induce the contractor to continue. SHRA attempted to shift blame for errors and omissions on the drawings and

responsibility for the unanticipated job site problems to Cullen. The architect acknowledged SHRA's field administrative staff did not do their jobs effectively.

In addition to SHRA's refusal to expeditiously and fairly handle the change order/extra work issues on the Rio Linda project, SHRA engaged in additional conduct that excessively and unreasonably increased the burden of construction on Cullen, well beyond the burdens anticipated by the contract. This conduct included unreasonable, unfair and incompetent field administration of the contract, the withdrawal of cooperation and assistance from Cullen coupled with the imposition of different and much more strict administrative requirements, the interference with Cullen's private credit and bond relationships, and the retention of all payments due Cullen on the Rio Linda project for alleged labor compliance violations on the Date Avenue project, in advance of the resolution of those

allegations adverse to Cullen.

At the outset of the relationship between Cullen and SHRA, SHRA tried to assist Cullen in the construction of the projects, to the extent such assistance did not cost SHRA any money. The assistance of SHRA was critical to the ability of Cullen to successfully perform the contracts and achieve the benefit of the bargain it made, and both Cullen and SHRA were well aware of this fact. Almost every aspect of the construction could be made significantly more difficult by SHRA, or smoothed and facilitated, depending upon the approach SHRA took toward the contractor. Particularly for a small contractor inexperienced in public contracting, as Cullen was, SHRA knew that its cooperation and assistance or lack thereof was the point upon which successful performance turned. SHRA's purposeful withdrawal of cooperation and assistance from Cullen in January, 1985 caused an excessive and unreasonable increase in the difficulty of Cullen's work and led to Cullen's

collapse and inability to complete the work. The knowing removal of SHRD's assistance and cooperation was SHRA's response to Cullen's complaints that SHRA was unreasonably hampering its ability to perform and was acting unfairly toward Cullen. SHRA representatives stated it did not have the time to "hand-hold" an "inexperienced contractor with shallow office support" and that is was "not in the business of training inexperienced contractors in public contracting". SHRA's expressed contempt for Cullen in these disparaging statements was matched by SHRA's disregard for its contractual obligations toward Cullen during the construction of the Rio Linda project.

In addition to making the obtaining of written change orders unreasonably difficult, which prevented Cullen from obtaining a legally enforceable right to receive compensation for extra work performed, SHRA's job site administrator on the Rio Linda project significantly hampered Cullen's ability to

perform. This administrator was known to SHRA to be a "nit-picker". On behalf of "having the best interests of the Agency at heart", this administrator added a substantial overlay of undisclosed additional requirements to Cullen's burdens, with the approval of SHRA. The demands he made upon Cullen were unreasonable, as were his inspections. He demanded a level of quality in the work that was well in excess of what SHRA had bargained for or was required by the specifications and drawings. He demanded the retention of the right to dictate the manner and means of construction, in disregard of industry practice that reserved such decisions to the discretion of the contractor. These practices, coupled with an intensely hostile and adversarial relationship with Cullen added substantially to Cullen's costs of construction at a time when cost overruns of the earlier two projects were impairing Cullen's ability to continue. The administrator invariably attempted to shift blame for errors and

omissions on the drawings and unanticipated problems to Cullen, and demanded Cullen remedy the problems at Cullen's cost. By attempting to force Cullen to remedy the errors and omissions without providing an enforceable right to compensation for the extra work, the administrator forced Cullen to become an unwilling financial participant in the construction.

The contracts called for the contractor to be able to furnish a reasonable amount of administrative support and oversight to enable the solution of administrative problems required by HUD-funded projects. Cullen's organization was not inadequate or incapable of meeting reasonable demands. The conduct of SHRA in administering the Rio Linda contract, combined with the circumstances of its administration of the earlier two contracts was incompetent, unfair and unreasonable. Due to SHRA's conduct, performance became much more difficult than anticipated on the Rio Linda contract. Larger

contractors testifying at the hearing made clear the fact that SHRA's administrative practices were a well-developed style of doing business that severely prejudiced the contractor's ability to make overhead costs and any profit at all. Disgusted with SHRA, these larger contractors had enough of their own assets to carry the projects they constructed for SHRA while the same administrative practices were applied to them. Each, however, found some of their expected profit and overhead disappeared into the projects, to the benefit of SHRA. Cullen was not so lucky. Overextended with three such projects being constructed simultaneously and struggling with an uncooperative SHRA, the removal of cooperation and assistance by SHRA in January, 1985, rendered Cullen unable to continue, following exhaustion of all reserves.

SHRA's removal of cooperation and assistance on the Rio Linda project involved a significant change in SHRA's rules governing the

documentation necessary to obtain payment for extra work and to obtain delays in the contract time. In attempting to assist Cullen on the Pomegranate and Date projects, SHRA's field administrator relaxed to some extent the general specifications governing submittals for change orders and time delays, together with supporting documentation. In January, 1985, during a particularly wet winter, SHRA recanted the acceptability of the procedures employed for earlier submittals, which had been in effect for about one year, without warning to Cullen. SHRA demanded strict compliance with the general conditions from that point. In changing the procedures, Cullen was denied nearly a month's inclement weather delay time, and SHRA set up Cullen's failure to comply with the strict requirements of the general specification as justification for SHRA's failure to promptly and expeditiously process Cullen's request for change orders. The timing of the procedural change came at a particularly difficult time for

Cullen, as the cumulative effects of the cost overruns on the first two projects were being felt.

In the late summer or early fall of 1984-1985, the Sacramento County labor compliance officer, under contract to SHRA to oversee labor compliance on the Date Avenue project, had a conversation with Cullen. This untrained and entirely inexperienced officer told Cullen that it could require its carpenters to provide their own power tools and extension cords. He was also aware that Cullen did not pay these carpenters for their setup and rollup time at the beginning and the end of the day, but made no mention to Cullen that the practice was a violation. In the winter of 1985, this same labor compliance officer cited Cullen, without prior warning, for labor compliance violations for failure to pay the carpenters for setup and rollup time, and alleged the requiring of carpenters to furnish their own power tools and extension cords violated the federal labor law.

Cullen complied immediately with all changes the citation demanded, but the citation also sought large fines and penalties for the violations.

In response to the citation, immediately SHRA froze over $82,000.00 due Cullen under the Rio Linda contract, to provide an asset base from which the fines could be recovered in the event they were sustained. The contracts did not require SHRA to take this step and no notice of lien or other asset-freezing action was taken by the County to seize payments due Cullen prior to a hearing of the matter. SHRA froze the payments due on the Rio Linda project even though the incidents alleged occurred on the Date Avenue project. SHRA's position was that "there's law" that permits them to seize payments due on one project to pay for incidents that occurred on another. SHRA further suspended all processing of Cullen requests for change order payments for extra work and held these funds, alleging such action was necessary to insure labor compliance.

Ironically, Cullen proved at the hearing that at least one of the labor compliance claims made against it was an outright fraud, and others may have been. While SHRA held all payments, Cullen was informed by the labor compliance officials that although it had a right to a hearing on the matters, such could take at least two years. Cullen was threatened that if it was considering the exercise of this right, Cullen could be subjected to collateral IRS, Treasury and Attorney General investigations as well, which could be very expensive to defend. With all construction funds being held and experiencing a serious cash deficit, Cullen relented and settled the matter, despite having evidence that at least a portion of the underlying claim was fraudulent. The fines were deducted from Cullen's Rio Linda funds being held. More than two months and significant attorney's fees were required for Cullen to extricate itself from allegations that resulted from the labor compliance officer's

failure to competently perform his duties. SHRA's unilateral freezing of Cullen's rights to payments on an unrelated project severely prejudiced Cullen's already impaired progress in construction and contributed significantly to his inability to complete the project.

The relationship between Cullen and SHRA deteriorated completely in March and April, 1985. In early March, 1985, construction was still progressing on the Rio Linda project, but very slowly. Cullen was very hard pressed for funds and a few of his subcontractors had already filed Stop Notices against the work. SHRA was incensed that Cullen's subcontractors were filing liens against the project, and was very unhappy that construction had nearly stopped. At this time, Cullen's attorneys had served upon SHRA a demand that SHRA release funds due Cullen, immediately process and pay all change orders and promises of compensation for extra work. The letter accused SHRA of bad faith and incompetence in the administration of

the contracts to Cullen's damage. In response, SHRA demanded that Cullen make more progress in construction, and advised Cullen that no more progress payments would be made to Cullen on the Rio Linda project until Cullen cleared all Stop Notices filed against any SHRA project Cullen was constructing and until Cullen obtained unconditional lien releases from all outstanding accounts on all of the projects Cullen as constructing for the Agency. This demand was made just after SHRA released the February progress payment to Cullen in early March, 1985. The demand to obtain unconditional lien releases from all outstanding accounts and to clear all Stop Notices as a pre-condition to the release of any further progress payments on the Rio Linda project was unreasonable. SHRA knew Cullen was experiencing a severe cash flow deficit at the time, and that no subcontractor with his wits still about him would sign an unconditional release as SHRA demanded. Conditioning Cullen's ability to receive

progress payments due on the Rio Linda project upon these unreasonable conditions further hampered Cullen in his ability to perform on that project at a critical period, where each additional impediment to performance was greatly magnified by the dire straits Cullen encountered.

In September, 1984, Cullen assigned all of its rights to payments on each of the four contracts with SHRA to the Bank of America in exchange for a $1 million line of credit. SHRA was notified of the assignment, and complied with it, making all further payments directly to the bank rather than to Cullen. On March 13, 1985, SHRA advised Cullen's bonding company on the Rio Linda project, in writing, that a "problem may exist" with construction progress, and that the bonding company should take "whatever action necessary" to ensure continued construction progress. At the time, SHRA was aware that Cullen was experiencing a severe cash flow problem that had slowed construction to

nearly a standstill, and that SHRA had decided to hold all funds due Cullen on all projects until its demands were met. SHRA thus knew that Cullen's financial condition was highly unlikely to improve, as Cullen's only other source of funds to continue construction was the line of credit at Bank of America. Since this line of credit depended upon the receipt of payments due Cullen from SHRA, and SHRA intended to retain those payments, SHRA knew this source of funding would not last much longer, especially if the bank was aware that the assigned payments would not be forthcoming.

Faced with imminent collapse, Cullen, through its attorneys, arranged with its bonding companies a plan by which the bonding companies would advance the funds to enable Cullen to complete the projects. The plan was dependent upon persuading the Bank of America to subordinate their primary claim to payments due from SHRA on the projects to the bonding companies. The plan failed when SHRA advised

the bank of its threat to assess liquidated damages in excess of $20,000.00 on each of the projects, which would evaporate the remaining funds over projected expenses that could be used to satisfy the bank's advances. In addition to this advisement, which was made three weeks before SHRA formally declared Cullen in default on the projects and the Stop Notices were filed by Cullen, SHRA also advised the bank that it was unwilling to make any concessions that would facilitate Cullen's completion of the projects. In response to SHRA's advisements, the bank terminated Cullen's line of credit and refused Cullen's request to extend credit further in order to continue with the work. The bank also refused to subordinate its interests to the bonding company, which was fatal to the plan.

The unsolicited contacts by SHRA with Cullen's bonding company and bank relative to the Rio Linda project, along with the advisement of the effects of the problems on the other projects, was the final and fatal blow to

Cullen. The advisements served to evaporate both Cullen's private funding and snuff out any possibility the bonding company might have stepped in to allow Cullen to complete the work. SHRA's acts made certain Cullen could not proceed with the work, as the actions removed Cullen's final options. Cullen was left with no choice but to file the Stop Notices and ultimately, for bankruptcy protection.

3. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

SHRA's conduct, acts and omissions, as set forth in this Finding and its subparts, breached the implied covenant of good faith and fair dealing implied in all contracts executed in California, including the Rio Linda project contract. Seaman's Direct Buying Service, Inc. v. Standard Oil Company of California (1984) 36 Cal.3d 752, 768. The cumulative effect of SHRA's conduct up to January, 1985 was very burdensome but not fatal to Cullen. SHRA's acts and omissions from January, 1985, forward, made

Cullen's performance as difficult as possible. SHRA's acknowledgement that it had purposefully withdrawn all cooperation and assistance from Cullen and that it would play "hardball" with Cullen was devastating and ultimately fatal. SHRA knew that Cullen could not possibly complete the work without its cooperation and assistance. The withdrawal of SHRA's support was manifested in the events as set forth, and in a myriad of smaller incidents that served to produce a cumulative effect of Cullen's inability to proceed. SHRA's decision to withdraw all cooperation and assistance from Cullen, and the adoption of a "hardball" approach, in light of all the facts and circumstances extant at the time of the decision, constituted bad faith and a breach of the implied covenant of good faith and fair dealing.

4. IMPLIED WARRANTY OF COMPETENT AND FAIR CONTRACT ADMINISTRATION

SHRA impliedly warranted to Cullen upon the

signing of the contract on the Rio Linda project that it could and would administer the contracts competently and fairly. As set forth in the Finding above and its subparts, SHRA' administration of the Rio Linda project was not competent or fair to Cullen. SHRA's conduct, acts and omissions as set forth breached this implied warranty. Cullen was damaged by this breach in that it lost the benefit of its bargain on the contract and encountered severe financial losses as this loss was combined with the effects of the failures of the other three projects for SHRA.

5. IMPLIED WARRANTY OF ACCURATE CONSTRUCTION DRAWINGS

SHRA impliedly warranted the accuracy of the construction drawings when those drawings were furnished to Cullen for the purpose of making its bids. Souza and McCue Construction Company v. Superior Court (1962) 57 Cal.2d 508, 510-11. Cullen relied upon the drawings in making its bid on the Rio Linda project. The

drawings were filled with errors and omissions, more than could or should have been expected. These errors and omissions created problems that required extra work by Cullen to resolve. The error and omission-laden drawings upon which Cullen relied breached the implied warranty that the drawings were accurate and reliable for use in conformity with their stated purpose. The breach damaged Cullen in that it was required to correct the errors and omissions as reflected in the construction as it progressed. SHRA compounded the damage by its conduct regarding change orders and compensation to Cullen for the extra work the corrections required.

VI

RESCISSION

The conduct, acts, omissions and breaches of SHRA as set forth in Finding V and its subparts constituted a material failure of consideration for the Rio Linda project on the part of SHRA. The same conduct, acts, omissions and breaches by SHRA made Cullen's continued

performance on the Rio Linda contract impracticable in that continued performance became excessively and unreasonably difficult and expensive. Although Cullen's performance on the Rio Linda project was not perfect, it was not established that Cullen was at fault in any significant manner for the failures that occurred. Cullen, a small and inexperienced contractor, overextended himself by taking on four substantial contracts with a notoriously difficult public agency. Conducting construction on the four contracts simultaneously was, in retrospect, a poor, but not necessarily fatal plan. However, Cullen was not advised in advance of the innumerable and unforeseeable problems it would encounter with SHRA itself and the manner in which SHRA would conduct itself. Cullen competently bid the projects and was adequately capitalized. The evidence does not lend itself to the conclusion that Cullen could not have completed the Rio Linda contract, although perhaps without

obtaining the benefit of overhead and profit, or even at a loss, in the absence of the acts, omissions, conduct and breaches Cullen experienced, both on the Rio Linda project, and the cumulative effect of the same on the earlier projects as it came to bear on the Rio Linda work. As SHRA's conduct caused a material failure of consideration, Cullen obtained the right to rescind the Rio Linda contract. Cullen exercised that right and declared the contract rescinded with the filing of its Stop Notice of April 22, 1985.

VII

FRAUD IN THE INDUCEMENT

It was not established that SHRA intentionally defrauded Cullen to induce entry into the four construction contracts. Although SHRA had informally developed a significant set of administrative practices to be used in the oversight of each of the contracts, and these practices were unknown and not reasonably knowable to Cullen at the time the contracts

were signed, there was no evidence that these administrative practices had been formally adopted by SHRA or were mandatory upon their contract administration personnel. Rather than being formal administrative practices, these procedures were an informal and selfish method of getting the work done with the interest of SHRA preeminent, and in disregard of the interests of the contractor. It was apparent that these practices preexisted the Cullen-built projects, and were applied to its successors as well. Little thought was given to the expansion and development of these administrative practices into a comprehensive style of doing business, which was the stage of development Cullen encountered when it commenced work on the projects. Less thought was given, at the time the contracts were entered into, that such administrative practices would have an inordinately burdensome effect upon a small contractor such as Cullen. SHRA ordinarily contracted with large firms for work, which were

much better able to absorb the additional costs and in-house administrative burdens these practices created. The evidence fails to disclose a knowing and intentional deception on the part of SHRA to induce Cullen to enter into the contracts, knowing that the undisclosed administrative procedures of SHRA would defeat its ability to successfully perform. Although SHRA knew Cullen was inexperienced, at the time the contracts were signed, SHRA intended to cooperate with and assist Cullen to perform. SHRA did not deceive Cullen into entering a contract relationship SHRA knew in advance would be impossible for Cullen to perform.

VIII

NEGLIGENT MISREPRESENTATION

SHRA negligently misrepresented to Cullen that SHRA could and would competently and fairly administer the contracts between Cullen and SHRA, that they would administer the contracts in accordance with the general and specific conditions, and that they would assist Cullen

and not do anything to hamper its ability to perform. SHRA failed to disclose to Cullen administrative practices that Cullen could not reasonably have discovered. Cullen was known to be particularly unfamiliar with SHRA/HUD projects. Despite intentions to assist Cullen in performing under the contracts, SHRA knew or should have known that its administrative practices were quite uncommon in the construction industry and the application of these practices to a small and inexperienced contractor such as Cullen would substantially increase its costs and administrative burdens, significantly hampering performance. SHRA's contention that Cullen was responsible for learning of these practices on his own and should have informed himself of the way SHRA does business before entering the contract lacks merit. For example, it was impossible for Cullen to learn from any source that SHRA intended to disregard the obligation to promptly process change orders requests if SHRA, in its

exclusive discretion, determined the change order was "too small".

No effort was made by SHRA to inform Cullen of the administrative practices or to assist with compliance. Instead Cullen was told that the contract would be administered by the "book". Based upon these negligent misrepresentations Cullen made its bids and obtained the contracts. None of the extra costs associated with additions or delays to the work that resulted from SHRA's application of those administrative practices were included in the bids. As a direct and proximate result of these negligent misrepresentations, Cullen entered into the contracts, which proved to be impracticable of performance, as set forth.

IX

FAILURE TO COMPLETE THE RIO LINDA PROJECT FOR THE CONTRACT AMOUNT

It was undisputed that Cullen quit work on the Rio Linda project when the work was 46% complete. Cullen was actually paid $309,002.00

for this work. The amount SHRA paid Cullen was 41.48% of the contract amount of $744,000.00, without any compensation for extra work Cullen actually performed. Forty-six percent of the contract price is $342,654.00. Cullen was underpaid $33,652.00 for the work it did complete. There was no credible evidence that this work was inadequate or failed to meet code or trade standards. The architect inspected and approved this work, as did SHRA's inspector, and both approved the percentage of acceptable completion. The work had additionally passed all required County building inspections as in compliance with building codes.

It was also undisputed that Cullen performed extra work on the Rio Linda project for which he was not paid. The amount of this work was significant but not proven in a specific dollar amount. The architect's letter of September 6, 1984 details five significant changes, and the record details others, such as the installation of attic wall separations,

adjustments to the concrete slabs required by SHRA, changes to support handicapped sinks, changes of location of medicine cabinets, treatment of cuts to pressure treated lumber, requiring Cullen to resolve off-site drainage, fencing and easement problems, requiring Cullen to redesign the architect's sprinkler system, relocation of windows that were spotted on the plans in violation of the local building code, being required to install 4 inch plumbing in less than 4 inch walls, and so on.

There was no dispute that Cullen did not complete the work on the Rio Linda project for the contract amount. Cullen completed only a portion of the work, for which it was paid a smaller proportion of the construction funds payable under the contract, as set forth above. Cullen's withdrawal from work at the Rio Linda project was legally justified, as set forth in Finding V and VI. The contractor is ordinarily obligated to complete work for which it contracts, even if continued performance becomes

unprofitable or difficult. A contractor is required to continue to perform, even if it is losing money and experiences cost overruns. However, the contract obligations to complete the work for the contract price are extinguished with the contract. Cullen rescinded the contract for the reasons set forth, and the rescission was reasonable under the totality of the circumstances. Therefore, Cullen's obligation to complete the contract performance for the contract amount was extinguished along with the contract itself.

As the contract and its performance obligations were extinguished by the recision by Cullen, a claim of restitution for the costs to complete performance is without merit. There is no continuing obligation to perform that was abandoned upon which an obligation to respond in restitution may be founded. SHRA's claim for restitution is particularly unfair under these circumstances. Cullen was underpaid for the work it did complete, and was not paid at all

for extra work. SHRA held up other rights to payment to provide funds against which unrelated project claims might be made. SHRA unreasonably and unjustifiably delayed the later completion of the Rio Linda project, causing ultimate completion to become significantly more expensive than it should have been. This unreasonable delay caused the wastage of properly completed work, the destruction of materials, and substantial and unnecessary security expenses.

The claim of restitution for amounts unpaid to Cullen's subcontractors who also filed Stop Notices is similarly without merit. Cullen received his last payment form SHRA on the Rio Linda project in early March, 1985. This progress payment was made for work completed in February, 1985. Cullen used this last disbursement to pay subcontractors for work rendered in February or before, including the payment of a couple of Stop Notices filed earlier. Work by subcontractors performed in

March, 1985, or work performed earlier but not invoiced until March were not paid because SHRA did not pay Cullen for that work. SHRA retained all further monies due to protect themselves as previously set forth. Cullen advised these unpaid subcontractors to file Stop Notices with SHRA, because any additional monies due Cullen would be first applied to these claims. Cullen alleged SHRA owed it in excess of $70,000.00 at the time, which was nearly enough to cover all claims. Cullen also knew its bonding company would be required to respond, which would provide additional funds. SHRA has refused to pay Cullen any of the funds due, which precludes the subcontractors from being paid. SHRA further ignored the subcontractor's claims against the project and applied every cent of the bonding company's settlement to the completion of the project. Under these circumstances, Cullen cannot be faulted for failure to make payment on subcontractor's Stop Notice claims for which Cullen had not been paid

by SHRA. SHRA refused to pay Cullen not only funds earned for some if not all of the work covered by the Stop Notices, but also for extra work performed by some of these same subcontractors. These funds were earmarked for the subcontractors due to the priority of the Stop Notices. Cullen had no control over the distribution of these funds and no funds of its own from which payment could be made.

It was not established that Cullen misapplied construction funds received on the Rio Linda project, to the prejudice of these subcontractors. No expenses listed by Cullen in accounting for the funds received from SHRA were demonstrated to have been inappropriate. Although Cullen's records were not entirely adequate, as set forth, Cullen credibly contended the listing of expenditures was complete and accurate.

X

ACCOUNTING FOR THE USE OF FUNDS PAID ON THE RIO LINDA PROJECT

Cullen Development failed to substantially account for the application or use of the funds received form SHRA on the Rio Linda project. Although Cullen presented each and every canceled check and a summary of those checks, such is inadequate evidence of substantial accounting. Having invoices for the expenditures would have been helpful but not essential. Substantial accounting means any sort of record keeping system that allows an outside examiner to verify that the expenditures stated were actually related to the project in question. The records presented by Cullen do not permit this sort of independent evaluation.

There is no doubt that the funds received by Cullen from SHRA on the Rio Linda project were properly applied to the project, as Cullen's testimony accompanying the canceled checks and summary was credible and supported by the remainder of the evidence as well. Although some of the individual expenditures were called into question, none were demonstrated to be

other than related to the project. For example, office rent costs were questioned, but it was clear that SHRA required the contractor to have an office and office support for the administration of the project. These costs were part of the contractor's overhead. The records presented, it should be noted, demonstrate the expenditure of $332,916.51 of Cullen Development Company funds on the Rio Linda project. Cullen received only $302,009.00 from SHRA for the same work. This approximately 10% cost overrun is consistent with Cullen's testimony that it experienced 10-12% cost overruns on each of the projects.

Although the record makes apparent Cullen appropriately used the funds, its record keeping was inadequate to permit an independent verification of that fact from the records themselves. As such, the records themselves fail to substantially account for the project expenditures. The failure is mitigated by the proof that there was no misapplication of those

same funds.

For the above reasons, the allegations that Cullen misapplied or diverted funds from the Rio Linda project due to the fact that some of Cullen's subcontractors did not receive payments for work on the project must fail. As set forth in Finding IX, the failure to pay subcontractors's Stop Notices is directly attributable to SHRA's retention of funds earned and due Cullen, and Cullen's ultimate bankruptcy. Misapplication or diversion of the funds to inappropriate purposes was not proven. There was little evidence that funds Cullen did receive was for work the unpaid subcontractors furnished to the project or that payment received should have been earmarked for payment to these subcontractors. Cullen paid out substantially more than he received on the Rio Linda project, but there was still a shortfall. The fact that some subcontractors did not receive payments for their work does not establish, without more evidence, that Cullen

applied funds received improperly.

XI

FAILURE TO FURNISH RECORDS TO THE BOARD

It was not established that Cullen refused to make available records pertaining to all four projects to the representative of the Contractors State License Board when requested on April 17, 1986 and December 11, 1987. The complaints were received by the Board in June, 1985. Investigation was not commenced on the matter until April, 1986, due to a backlog of cases. On April 17, 1986, the Board served upon Cullen a request for records of the four projects. On May 10, 1986, Tom Cullen, on behalf of Cullen Development, responded to the Board's investigator that all records of the projects were either turned over to attorneys due to litigation having been commenced over the projects, or were in the possession of SHRA. The letter requested the name of a Board representative Cullen could speak with regarding the case. Mark Cullen followed up the letter

with a telephone call to the Board's investigator. In the phone call, Cullen agreed to furnish the records when he was able, and asked for an extension of time because the records were being used in litigation with SHRA. The requested extension was granted, although the investigator did not believe he would be granted access to the records due to the nature of the case. The matter was shelved by the Board for the next eight months due to transfers of caseloads within the Board's investigative staff. No response was made to Cullen in this period, and due to the long passage of time without follow-up by the investigator, Cullen believed the matter had been resolved.

On December 11, 1987, the Board's investigator, after having reactivated the investigation, again requested Cullen's records. Mark Cullen responded to the letter on the telephone and in writing, and agreed to furnish the requested records, advised of the status of litigation between Cullen and SHRA, and

requested an extension of time to compile the voluminous material until late January, 1988. Cullen advised in the same letter that litigation was continuing with SHRA, requiring him to continue to need the originals of the documents, but that Cullen was copying files and would forward the copies.

On February 18, 1989, Mark Cullen wrote the Board's investigator to request a further extension of time within which to comply with the Board's request for examination of Cullen's documents. Cullen requested an additional 90 days due to the fact that a significant amount of documentation had been required by the Internal Revenue Service for an audit, and other documents were in Arizona. Cullen advised the audit was not completed, and the additional time would permit him to assemble and furnish the copies. The Board's investigator did not respond to the request other than to assist in the filing of the Accusation against Cullen containing one allegation that Cullen refused to

furnish the documents.

Following the filing of Accusation, Cullen furnished all the documents requested, and more, as part of prehearing discovery. The documents were all organized, indexed and tabbed for easy reference, and it was not contended, nor could it be, that the documentation was not complete in every respect, excepting the accounting for the expenditure of Rio Linda funds, as set forth previously.

Although no actual exchange of documents occurred in response to the Board's investigator's requests before the filing of the Accusation, there was no proof that the failure was due to Cullen's refusal to provide the documents. The documents are voluminous, filling numerous boxes, and were subject to at least two other claims on their use before they could be made available to the investigator. Cullen never refused to provide the documents, and maintained contact with the investigator after the case had been again activated. The

investigator did not pursue the matter diligently for a number of reasons, including his belief that Cullen would not comply with the request. Although there are times where a failure to furnish the requested documents following two written requests therefor equates to a refusal to furnish them, under these circumstances the failure to furnish was not the result of Cullen's refusal to comply.

XII

OTHER MATTERS

It was not established that Richard N. Cullen and/or James P. Cullen had any knowledge of or participated in any of the events surrounding the Rio Linda project or its failure. Mark T. Cullen and Tom Cullen were the active principals of Cullen Development on the Rio Linda project, with Tom Cullen acting as construction superintendent, and Mark Cullen as partner in charge of all operations. The roles of James and Richard Cullen in the partnership were not established.

Mark Cullen has been in the real estate development and construction business for about seven years. During this period, he has expanded operations from the remodeling of existing single family homes for investment purposes to original construction as a general contractor. Cullen, through his companies, Niscull Investment Corporation and Cullen Development Company, has built single family and multiple family residential units, residential facilities for the elderly, and a branch courthouse facility for the County of El Dorado. The largest project Cullen had previously built was valued at $274,000. Cullen's experience in public contracting was limited to the branch courthouse and an extensive base housing remodeling project for the U.S. Air Force. Cullen had excellent references, excellent credit and had never failed to complete a project in a timely fashion for the contract price before the projects with SHRA. He is personally involved in bankruptcy proceedings,

as is Cullen Development Company. The litigation between Cullen Development Company and SHRA is not yet completed, and Cullen Development is still subject to lawsuits from its bonding companies. Mark Cullen wants to retain his contractor's license although he realizes that it will take a substantial period of time to resolve all the pending matters that resulted from the failures of the projects for SHRA. Cullen is not currently contracting and has no current projects.

DETERMINATION OF ISSUES

I

Cause does not exist for the imposition of discipline against the contractor's license held by Cullen Development Company pursuant to Business and Professions Code section 7017. Although it was established that Cullen Development abandoned work on the Rio Linda project, it was not established that the abandonment was without legal excuse, as set forth in Finding IV, V, and VI. Although mere

unforeseen difficulty or expense does not constitute impossibility of performance, and thus does not excuse performance, impossibility does constitute a defense when performance is impracticable because of excessive and unreasonable difficulty or expense. 1 Witkin, Summary of California Law (Ninth Edition, 1987), "Contracts", section 786, p. 709. Prevention or hindrance of the other party's performance excuses the obligation of performance as well. Civil Code section 1511(1), Witkin, op. cit., section 794, p. 717. If the consideration for the obligation fails in a material respect, the right to rescind the contract arises. Civil Code section 1689(b)(4).

As set forth in Findings V and VI, SHRA's acts, omissions, conduct and breaches of implied covenants and warranties caused a material failure of consideration, hindered Cullen's performance unreasonably, rendered Cullen's performance impracticable due to excessive and unreasonable expense and difficulty, and thus

established Cullen's right to rescind the contract. As rescission extinguished Cullen's continued obligation to perform, Cullen abandoned the work with legal excuse.

The contention that the contractor may not abandon the work for failure of the owner to pay for extras, as set forth in Karz v. Department of Professional and Vocational Standards, Registrar of Contractors (1936) 11 Cal.App.2d 554, 557, must fail. Karz reiterates the general rule, as recited above, that the contractor may not abandon the work or rescind the contract for the owner's breach, unless the breach "goes to the root of the consideration". In Karz, the owner's failure to pay for extra work was incidental and collateral to the main objective of the contract. In the instant matter, the collective whole of SHRA's conduct, including breach of promises to pay for extra work, among numerous other things, went to the root of the consideration and caused its material failure.

The contention by SHRA and the Deputy Attorney General that the conduct of SHRA in administering the other contracts cannot be considered in assessing the reasonableness of Cullen's conduct under the Rio Linda contract is misplaced. Cullen constructed the projects sequentially yet simultaneously, using the same crews, same contractors and the same administration. During most of the period at issue, three projects were under construction simultaneously. By the same token, SHRA administered each with the same staff, and although accounting was kept separate, the relationships and conduct of the parties treated the contracts as a continuous whole with separate phases. Further, SHRA was not constrained to seize funds due to Cullen on one project for alleged violations on another, stating "there's law" that allow it to do so. The conduct of SHRA on the Pomegranate and Date projects defined the relationships and set the stage for what occurred on the Rio Linda

project. The SHRA conduct on the previous projects substantially exhausted both Cullen's financial resources and its ability to continue to successfully work under unfair and unreasonable administrative practices that, by the time the Rio Linda contract was in full swing, made it apparent to Cullen that its profit, overhead and own capitol would be swallowed up to help SHRA pay for the work. To exclude references to the other projects in assessing what happened on the Rio Linda project would thus be manifestly unfair.

II

Cause does not exist for the imposition of discipline against the contractor's license held by Cullen Development Company pursuant to Business and Professions Code section 7113, in that it was not established that Cullen failed in a material respect to complete the Rio Linda project. As set forth in Findings III, IV, VI, VII, X, XI, XII, and XIII, Cullen rescinded the contract with legal justification, which

extinguished the obligation to complete the project for the contract price.

III

Cause exists for the imposition of discipline against the contractor's license held by Cullen Development Company pursuant to Business and Professions Code section 7108. As set forth in Finding XIV, Cullen Development failed to substantially account for the funds received from SHRA for the Rio Linda project.

IV

Cause does not exist for the imposition of discipline against the contractor's license held by Cullen Development Company pursuant to Business and Professions Code section 7111. As set forth in Finding XV, it was not established that Cullen refused to provide the records the Board requested.

ORDER

Contractor's license number 448299, classification B, issued to Cullen Development Company, is suspended for a period of thirty

(30) days, for the cause determined in Determination of Issues III. The period of suspension shall commence with the effective date of the adoption of this decision. Following the expiration of the period of suspension, the license rights shall be fully restored. The license shall not be reactivated following the expiration of the period of suspension until the bond requirements of Code of Civil Procedure section 996.340 have been met.

In all other respects the Accusation is dismissed.

Dated: May 22, 1990

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings

APPENDIX K

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Attorneys for Plaintiff

FILED: JUNE 21, 1987

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

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HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, A Public body corporate and politic, Plaintiff, v. JAMES CULLEN, MARK T. CULLEN, and RICHARD CULLEN doing business as CULLEN DEVELOPMENT COMPANY, and DOES 1 to 10, Defendants.	NO. 331596 JUDGMENT AFTER TRIAL BY SUPERIOR COURT
AND RELATED CROSS-ACTIONS.	

This cause came on regularly for trial on June 16, 1987 in Department 6 of the above-entitled court, the Honorable JAMES I. MORRIS,

Judge, presiding, sitting without jury, a jury having been duly waived. BRENTON A. BLEIER appeared as attorney for Plaintiff HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, Defendants JAMES CULLEN and CULLEN DEVELOPMENT COMPANY appeared Pro per by JAMES CULLEN. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision, and a statement of decision not having been requested,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment be entered in the above-entitled cause in favor of Plaintiff HOUSING AUTHORITY COUNTY OF SACRAMENTO and against Defendants JAMES CULLEN and CULLEN DEVELOPMENT COMPANY in the sum of $366,261.94.

Dated: June 21, 1987

JAMES I. MORRIS
Judge of the Superior Court

Judgment entered on _____, 1987 in Vol. _____ of the Judgment Book, page _____.

_____
Clerk

By_____
Deputy Clerk

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Attorneys for Plaintiff

FILED: OCTOBER 13, 1987

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

-o0o-

HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, A Public body corporate and politic, Plaintiff, v. JAMES CULLEN, MARK T. CULLEN, and RICHARD CULLEN doing business as CULLEN DEVELOPMENT COMPANY, and DOES 1 to 10, Defendants. AND RELATED CROSS-ACTIONS.	NO. 331596 PROPOSED JUDGMENT AFTER TRIAL BY SUPERIOR COURT

This cause came on regularly for trial on June 16, 1987 in Department 6 of the above-entitled court, the Honorable JAMES I. MORRIS, Judge, presiding, sitting without jury, a jury

having been duly waived. BRENTON A. BLEIER appeared as attorney for Plaintiff HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, Defendants JAMES CULLEN and CULLEN DEVELOPMENT COMPANY appeared Pro per by JAMES CULLEN. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision, and a statement of decision not having been requested,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment be entered in the above-entitled cause in favor of Plaintiff HOUSING AUTHORITY COUNTY OF SACRAMENTO and against Defendants JAMES CULLEN and CULLEN DEVELOPMENT COMPANY in the sum of $366,261.94, and that Defendants take nothing by their Cross-Complaint.

This judgment is entered nunc pro tunc and is effective June 21, 1987.

Dated: October 13, 1987

JAMES I. MORRIS
Judge of the Superior Court